The Law Commission

Working Paper No. 76

Time Restrictions on Presentation of Divorce and Nullity Petitions

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It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 31 October 1980.

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THE LAW COMMISSION

WORKING PAPER NO. 76

FAMILY LAW[1]

TIME RESTRICTIONS ON PRESENTATION OF DIVORCE AND NULLITY PETITIONS

PART I: INTRODUCTION

1. This working paper is concerned with two time restrictions which may affect the bringing of proceedings under the Matrimonial Causes Act 1973: first, the rule which prohibits the presentation of a petition for divorce within three years of marriage unless a case of exceptional hardship or exceptional depravity is made out[2] and, secondly, the rule that proceedings for nullity must in certain cases be brought within three years from the date of the marriage.[3]

2. Discussion of the three year restriction on the presentation of divorce petitions necessarily involves some examination of the policy objectives of a good divorce law,[4] but we consider that the three year restriction can usefully be considered by itself as a separate issue. There has in

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1 Item XIX of the Second Programme

2 Matrimonial Causes Act 1973, s.3 which is set out in Appendix 1 to this paper.

3 Ibid., s.13(2). Sects. 12 and 13 of the Act are set out in Appendix 2 to this paper.

4 See Reform of the Grounds for Divorce: The Field of Choice Law Com. No.6(1966) Cmnd. 3123 paras. 13-18. (This report is referred to hereafter as The Field of Choice).

recent years been mounting criticism of the restriction,[5] which dates back to 1937. Any reform would be limited in scope and would not necessitate change in the law relating to the ground for divorce, though we intend as part of our task of keeping the law under review[6] to carry out a general examination of the law governing the availability of divorce, initially by way of a working paper which will analyse the operation of the present law and consider options for reform.[7] We hope that that working paper will help to stimulate informed discussion of the major issues of policy involved, but it seems to us inevitable that the public debate on those issues will be lengthy. However, in our view there is no sufficient reason to postpone reform of the three year restriction which (for the reasons discussed below) we believe to be desirable.

3. It is right to point out at the outset that the Law Commission did give consideration to the three year rule in divorce some thirteen years ago in The Field of Choice,[8] and then recommended[9] that it should be retained. However the

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5 See Bill Mortlock, The Inside of Divorce: A Critical Examination of the System (1972) pp.11-15; Mary Hayes, "Restrictions on Petitions for Divorce within Three Years of Marriage" (1974) 4 Fam. Law 103; J.G. Miller, "The Restriction on Petitions for Divorce within Three Years of Marriage" (1975) 4 Anglo-American Law Review 163; M.D.A. Freeman, "When Marriage Fails - Some Legal Responses to Marriage Breakdown" [1978] C.L.P. 109, 119-20; Terence Ingman, "Divorce within the First Three Years of Marriage" (1979) 9 Fam. Law 165.

6 Law Commissions Act 1965, s.3(1).

7 Our decision to undertake this review was announced in our Fourteenth Annual Report (1980) Law Com. No. 97, para. 2.24.

8 Law Com. No. 6 (1966) Cmnd.3123.

9 Ibid., para.19.

experience of the divorce reform legislation[10] since 1971 (when the Divorce Reform Act 1969 came into force) and particularly the application of the "special procedure" to undefended cases,[11] has introduced a new dimension which, in our view, makes it appropriate for us now to re-examine this rule.

4. It should also be pointed out that the Commission examined the whole of the law of nullity in 1970 in its Report on Nullity of Marriage.[12] That Report proposed that nullity petitions on certain grounds should be brought within three years of the marriage, without any exception to cover the case where a party was under a disability. The reason why we think it appropriate to re-examine this limited topic at this stage is that there is now evidence that a time limit may cause hardship where the petitioner suffers from mental incapacity.

Arrangement of the working paper

5. In Part II of this paper we examine the history of the three year rule in divorce, its working in practice, and the experience elsewhere in the United Kingdom; and we present a field of choice which canvasses the possibilities for reform. In Part III we deal with the rule relating to nullity proceedings in cases of mental incapacity and propose reform.

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10 Divorce Reform Act 1969; now consolidated in the Matrimonial Causes Act 1973.

11 See para. 26, below.

12 Law Com. No. 33 (1970).

PART II: THE THREE YEAR RULE IN DIVORCE

(1) The history and previous consideration of the rule

(a) The Matrimonial Causes Act 1937

6. Until the passing of the Matrimonial Causes Act 1937 there was no time restriction on the presentation of a divorce petition; a petition could be presented within months (or even days) of the marriage ceremony if it was based on one of the (then very restricted) grounds for divorce. The 1937 Act considerably extended the grounds on which a decree of divorce could be granted[13] and introduced the present time restriction. The parliamentary history of the legislation is of some importance. The Bill leading to the Act, introduced by Sir Alan Herbert (as he later became), did not originally contain a time restriction. However, a clause was proposed whose effect would have been to impose an absolute bar on divorce proceedings within five years of marriage. This proposal was a compromise provision, intended to satisfy some of those opposed to extending the grounds for divorce, and seems to have been effective in so doing in the House of Commons.[14] When the Bill was considered by the House of Lords the new clause was sharply criticised,

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13 Broadly speaking, before the 1937 Act adultery was the chief ground for divorce by either spouse; the Act introduced the separate grounds of cruelty, three years' desertion and incurable insanity. These remained the basis of the divorce law until 1 January 1971, when the Divorce Reform Act 1969 came into force.

14 See A.P. Herbert: The Ayes Have It (1937) for an account of the passing of the Act. The author commented "...We should not have got a Second Reading without it (the restriction), or after that passed through the Committee stage as smoothly as we did". (ibid., at p.65). The low proportion of marriages dissolved in the first five years of marriage persuaded Sir Alan Herbert to support the restriction (ibid).

particularly by Lord Atkin, a Lord of Appeal.[15] The point was forcefully made that the cases where divorce was sought early in the marriage were very often the worst cases coming before the courts.[16] In the result a further compromise was made; the suggested five year period was reduced to three years and the court was given a discretion to allow the presentation of a petition within that period if satisfied that the case fell within the stipulated categories of exceptional hardship or exceptional depravity.

(b) The Denning Committee

7. The three year rule was subsequently reviewed in 1946 by the Denning Committee[17] who made minor criticisms of the way the rule operated and recommended procedural amendments[18] which were later implemented.[19]

(c) The Morton Commission

8. The next examination of the three year rule came with the Morton Commission Report in 1956.[20] The Morton Commission's view was that the rule had a "stabilising effect"

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15 Ibid., pp. 182-183; Hansard (H.L.) vol.105 (1936-7) cols. 730-848; he thought that the clause was "terrible" and "a kind of 12½ per cent. discount offered to the opponents of the Bill" (ibid., cols.755, 758).

16 Hansard (H.L.) vol. 105, col. 755 per Lord Atkin.

17 Committee on Procedure in Matrimonial Causes, Second Interim Report (1946) Cmd.6945.

18 Ibid., paras.13-15.

19 See Matrimonial Causes Rules 1950 (S.I. 1950 No. 1940) r.2: reforms included the abolition of a preliminary hearing before the registrar; and the simplification of the rules as to service and to the fixing of hearings.

20 The Report of the Royal Commission on Marriage and Divorce (1956) Cmd.9678.

on marriage:[21] the Commission thought that the rule encouraged husbands and wives to face and resolve their differences in the "period of adjustment which necessarily takes place during the first few years of married life".[22] The Commission accordingly recommended retention of the rule. It felt that in England and Wales broken marriages were a grave problem;[23] it was against any modification of the rule which, it felt, had a "deterrent value".[24]

(d) The Archbishop's Group

9. Ten years after the publication of the Morton Commission Report a Group appointed by the Archbishop of Canterbury published a report on divorce law, Putting Asunder: A Divorce Law for Contemporary Society.[25] The Archbishop's Group briefly reviewed the three year rule and recommended its retention. The Group thought that separation (rather than divorce) would normally be appropriate during the three year period. They considered that "it is not desirable that persons who have been so unwise in their choice of partners as to be confronted with an 'intolerable situation' within three years of marriage should be enabled to marry again without an interval for reflection".[26] But the Archbishop's Group accepted that divorce should nevertheless be available in "exceptional" circumstances; and added that in the light

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21 Ibid., para.215.

22 Ibid.

23 The Commission's recommendation regarding Scottish law was different: see para.43, below.

24 (1956) Cmd.9678, para.216.

25 (1966).

26 Ibid., Appendix C. para.4.

of the "doctrine of breakdown" (which was proposed as the sole criterion for divorce)[27] "the terms of the discretion given to a judge to allow exceptions to the rule might in part need reconsidering."[28]

(e) The Law Commission's Report on Reform of the Divorce Law

10. The Law Commission was asked to make a report in the light of Putting Asunder. In The Field of Choice[29] the Commission dealt briefly with the three year rule, recommending its retention:

> "(The rule) seems to have proved generally acceptable to public opinion and we know of no widespread agitation for its deletion. Its retention was advocated both by the Morton Commission and by the Archbishop's Group. In our opinion it is a useful safeguard against irresponsible or trial marriages and a valuable external buttress to the stability of marriages during the difficult early years. It therefore helps to achieve one of the main objectives of a good divorce law."[30]

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27 Proof of breakdown was to be established by a full enquiry into the marriage.

28 Putting Asunder, para.78.

29 Law Com. No. 6 (1966) Cmnd.3123.

30 Ibid., para. 19. The main objectives of a good divorce law were said to be:

"(i) To buttress, rather than to undermine, the stability of marriage; and

(ii) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation": ibid., para.15.

The Commission thought that divorce should not be "so easy that the parties are under no inducement to make a success of their marriage and, in particular, to overcome temporary difficulties".[31] The Commission also considered that the law should give every encouragement to reconciliation.

11. The Divorce Reform Act 1969 represented a compromise between Putting Asunder and The Field of Choice.[32] It did not alter the three year rule in any way, and there was no debate on the rule during the passage of the Bill through Parliament.

(2) The present legal position

(a) The general rule

12. The basic statutory provision is now section 3 of the Matrimonial Causes Act 1973 which provides that the leave of the court is required for the presentation of a petition for divorce[33] before the expiration of three years from the date of the marriage. Leave may only be given if the petitioner establishes that the case is one of exceptional hardship suffered by him or of exceptional depravity on the part of the respondent.[34] Even where a case of exceptional hardship or depravity is made out, the court has a discretion whether or not to grant leave.[35] It is specifically provided

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31 Ibid., para.16.

32 For the compromise agreed between the Commission and the Archbishop's Group, see the Commission's Third Annual Report (1967-68) Law Com. No.15, Appendix III.

33 There is no such restriction on petitions for nullity or judicial separation; see paras.32-34 and 52, below.

34 Matrimonial Causes Act 1973, s.3(2).

35 Charlesby v. Charlesby (1947) 176 L.T. 532; C. v. C. [1967] P.298. It would be rare for a court to refuse leave having found a case of exceptional hardship or depravity made out.

that in determining whether to grant leave the court shall have regard to the interests of any child of the family, and to the question whether there is reasonable probability of a reconciliation between the parties during the three year period.[36] The case law[37] emphasises the importance of prospects of reconciliation. The court will therefore consider all the circumstances, such as the unreasonable refusal of the applicant spouse to entertain overtures for reconciliation; or, equally, the fact that a spouse might, if leave were refused, "be kept ... with proceedings in contemplation, so that her memories remain raw and she is tied with a bond which has become practically meaningless".[38]

13. Applications for leave to present a petition within three years of marriage are made by originating application supported by an affidavit sworn by the proposed petitioner and served on the other spouse.[39] The affidavit must exhibit a copy of the proposed petition and give particulars of the hardship or depravity alleged. The application is made to a divorce county court[40] and is

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36 Sect.3(2) of the 1973 Act. In the affidavit in support of his application for leave an applicant must set out any circumstances which would assist in determining whether there is a reasonable probability of a reconciliation: Matrimonial Causes Rules 1977 (S.I. 1977 No. 344) r. 5(2)(a)(v).

37 "The really important consideration in all these cases is to see whether there is any chance of reconciliation": Bowman v. Bowman [1949] P.353, 357 per Denning L.J. An attempt to promote reconciliation resulted in 1967 in the setting up of machinery to assist the court but this seems to have failed; see para.69, below.

38 C. v. C. [1967] P.298, 305-6 per Sir Jocelyn Simon P.

39 Matrimonial Causes Rules 1977, r.5.

40 If the respondent gives notice of intention to defend, the application must be transferred to the High Court: Matrimonial Causes Rules 1977, rr.5(2), 6(1) and 6(3).

heard (unless otherwise directed) by a judge in chambers. We understand, from enquiries made at the Principal Registry, that even if the application is not defended, the applicant is normally expected to attend so as to be available to supplement (if need be) his or her affidavit by oral evidence.

14. It has been held that a judge deciding whether exceptional hardship or exceptional depravity has been made out does not determine whether the allegations are true, since that would amount to hearing the petition itself;[41] he merely determines whether, if true, they would amount to exceptional hardship or exceptional depravity.[42] Nevertheless, the judge need not - indeed should not[43] - accept the evidence uncritically. He "can consider it against the general background of the marriage as disclosed at this stage, and against any evidence filed in opposition. The court can also take into account, if such be the case, that the charges are inherently improbable, or that the conduct complained of seems to have been provoked, or that there is self-inconsistency in the evidence filed .... The court can, if necessary, order a deponent to be cross-examined on his affidavit ... though this will be done only in exceptional circumstances."[44] The judge has a broad discretion as to

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41 G. v. G. (1968) 112 S.J. 481. In practice, if the petition is undefended, there will now be no "hearing" of the petition since the special procedure (see paras. 26-30, below) will apply.

42 Brewer v. Brewer [1964] 1 W.L.R. 403, 410 per Willmer L.J.

43 See Simpson v. Simpson [1954] 1 W.L.R. 994 where it was held that the applicant wife's affectionate letters to the respondent after the conduct complained of should have been taken into account by the judge in examining the evidence; and, on the facts, the decision to grant leave was reversed.

44 W. v. W. [1967] P.291, 296 per Sir Jocelyn Simon P.

what may constitute exceptional hardship or depravity and it has been held that the Court of Appeal will be slow to interfere with his decision.[45]

15. If, at the hearing of a petition presented by leave, it appears that leave was obtained by misrepresentation or concealment of the nature of the case, the court has power to dismiss the petition, or to grant a decree but direct that it should not be made absolute until three years from the date of the marriage.[46]

16. It should be noted that the general rule prohibits the presentation (without leave) of a petition within three years from the date of the marriage; it does not prohibit the presentation of a petition outside that period which is based wholly or partly on matters which occurred within the period.[47] For example, once the three year period has expired, a petitioner can rely on the respondent's behaviour[48] or on a single act of adultery[49] in the early years of the

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45 See Winter v. Winter [1944] P.72. Cf. C. v. C. (Divorce: Exceptional Hardship) [1979] 2 W.L.R. 95; Woolf v. Woolf (1979) 9 Fam. Law 216.

46 Sect.3(3) of the 1973 Act. The subsection is aimed only at deliberate misrepresentation or concealment: Stroud v. Stroud (No.2) [1963] 1 W.L.R. 1083. The power to dismiss the petition does not prevent the presentation of another petition on the same or substantially the same facts after the expiry of the three years: 1973 Act, s.3(3).

47 Sect.3(4) of the 1973 Act.

48 Sect.1(2)(b) of the 1973 Act: see para.24, below. Cruelty and adultery were grounds for divorce under the old law. By the Divorce Reform Act 1969, irretrievable breakdown of marriage became the sole ground for divorce but such breakdown could only be inferred from proof of certain facts (see para.24, below) two of which were based on the respondent's behaviour or his adultery. The words "behaviour" and "adultery" are used as convenient abbreviations.

49 Sect.1(2)(a) of the 1973 Act: see para.24, below.

marriage[50] even if an application for leave has been made and dismissed.

(b) The exceptions

(i) Hardship suffered by the petitioner

17. The courts have refused to set out exhaustively what can constitute exceptional hardship, but examples (mostly dating from before the Divorce Reform Act 1969) of conduct which has been held to fall on each side of the line can be given. The courts have emphasised the "exceptional" nature of the hardship required to be shown.[51] It was said that in most divorces based on adultery or behaviour there would probably be hardship for the "innocent" spouse; and what had to be shown was hardship which transcended the inevitable hardship caused by divorce.[52] However, the test of exceptional hardship is subjective: it is based on its effect upon the particular applicant, not on what its effect might reasonably be expected to be on an ordinary person.[53] Thus, exceptional

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50 It would, however, be a bar to the grant of a decree based on adultery that the parties had lived with each other for more than 6 months after the adultery became known to the petitioner: ibid., s.2(1); and it would b necessary for the petitioner to satisfy the court that at the date of the hearing he found it intolerable to live with the respondent: ibid., s.1(2)(a); Biggs v. Biggs and Wheatley [1977] Fam.1.

51 See, e.g. Bowman v. Bowman [1949] P.353, 356-7 per Denning L.J.; and Fisher v. Fisher [1948] P.263. But cf. C. v. C. (Divorce: Exceptional Hardship) [1979] 2 W.L.R. 95; para.19, below.

52 See Bowman v. Bowman [1949] P.353. In Brewer v. Brewer [1964] 1 W.L.R. 403, 413 Pearson L.J. referred to the "normal standard of hardship suffered by the petitioning wife" as opposed to "exceptional" hardship.

53 Hillier v. Hillier and Latham [1958] P.186.

nervous anxiety[54] or, in certain circumstances, eviction from the home[55] have been held to constitute exceptional hardship. Furthermore, the court considers not only the hardship suffered by the applicant in the past as a result of the conduct of the other spouse[56] but, perhaps more importantly, the hardship caused to the applicant in the present and likely to be caused in the future from having to wait for the rest of the three year period before the marriage can be dissolved.[57]

18. It will be apparent that the decision as to whether the case is "exceptional" involves the application of a value judgment "of an unusually subjective character".[58] Since standards in society change over short periods of time, it is not surprising that some decisions - even comparatively recent ones - now seem somewhat harsh. For instance, it was held that a respondent wife's adultery resulting in the birth of a child did not of itself constitute exceptional hardship to the petitioner;[59] and leave was refused in a case where the applicant was said to have been driven to attempt suicide.[60] In another case, leave was refused where the applicant's

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54 Ibid., where the applicant husband was said to have suffered "to a perhaps unusual extent" from nervous anxiety following his wife's adultery, and was given leave to present a petition.

55 In Montague v. Montague (1974) 4 Fam. Law 88, leave was given where the allegations were of bullying and morose conduct, coupled with violence which forced the applicant, an elderly woman, to leave the property of which she was the sole owner.

56 Bowman v. Bowman [1949] P. 353.

57 Hillier v. Hillier and Latham [1958] P. 186, 192 per Romer L.J.; and C. v. C. (Divorce: Exceptional Hardship) [1979] 2 W.L.R. 95, 98 per Ormrod L.J.

58 C. v. C. (Divorce: Exceptional Hardship) [1979] 2 W.L.R. 95, 97 per Ormrod L.J.

59 Hillier v. Hillier, above; leave was granted on other grounds: see n.53, above. See also Lamb v. Lamb (1976) 6 Fam. Law 83.

60 In Sanders v. Sanders (1967) 111 S.J. 618 it was alleged that the applicant husband had attempted suicide because he could not remarry.

health had suffered very seriously.[61] Even in what was called a "bad case" of violence and drunkenness on the part of the husband, the lack of any continuing hardship led to the application being refused.[62] Hardship brought on in part by the applicant's own conduct (for example the wish to marry someone else) has been held not to be exceptional.[63] In Blackwell v. Blackwell[64] it was held that adultery after two months of marriage, coupled with desertion, one incident of violence and other complaints, constituted neither exceptional hardship nor depravity. The Court of Appeal said that "exceptional hardship" should be construed as ordinary English words in the way in which "sensible, right-thinking people would construe them";[65] and the court criticised an earlier attempt, made[66] by Denning L.J., to lay down general guidelines[67] as to what would constitute sufficiently exceptional behaviour.

19. The recent case of C. v. C. (Divorce: Exceptional Hardship)[68] is the first reported case since the coming into force of the Divorce Reform Act 1969 to give full consideration to the criterion of exceptional hardship against

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61 L. v. L. (1965) 109 S.J. 108; but see Woolf v. Woolf (1979) 9 Fam. Law 216, where serious suffering in health and setback to a wife's career were held, on the facts, to constitute exceptional hardship.

62 Brewer v. Brewer [1964] 1 W.L.R. 403 (where the parties had separated at the date of the hearing).

63 See W. v. W. [1967] P. 291; Sanders v. Sanders (1967) 111 S.J. 618; Lamb v. Lamb (1976) 6 Fam. Law 83.

64 (1973) 117 S.J. 939.

65 Ibid., per Lawton L.J.

66 In Bowman v. Bowman [1949] P. 353, 357.

67 See para. 20, below.

68 [1979] 2 W.L.R. 95.

the background of the modern divorce law.[69] In that case the Court of Appeal allowed a wife's appeal against the refusal of leave: her case was that the marriage "had proved to be a disastrous failure within a few weeks because soon after the honeymoon to all intents and purposes the husband became impotent".[70] It transpired[71] that he was a homosexual; he formed an association with a young cousin, and finally left his wife after only two and a half months of marriage. Ormrod L.J., giving the judgment of the court, emphasised that all hardship, whether past (arising from the conduct of the other spouse) present or future (from having to wait until the period had elapsed) could be considered; and he suggested that the change in the basis of divorce from matrimonial offence to irretrievable breakdown of marriage, with the "expectation of relatively easy divorce", might have increased the hardship involved in having to wait for the period to elapse.[72] On the facts the Court of Appeal found exceptional hardship to exist; the decision may (particularly in the light of Ormrod L.J.'s remarks) increase the scope for arguing that a case falls within the hardship exception.[73]

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69 Since the 1969 Act there have been other cases (not fully reported): Blackwell v. Blackwell (1973) 117 S.J. 939; Montague v. Montague (1974) 4 Fam. Law 88; and Lamb v. Lamb (1976) 6 Fam. Law 83; but none seem to have considered the criteria for granting leave expressly against the background of the 1969 Act.

70 [1979] 2 W.L.R. 95, 96 per Ormrod L.J.

71 The parties had lived together for three years before the marriage during which time they had had a normal heterosexual relationship.

72 [1979] 2 W.L.R. 95, 98.

73 See also Woolf v. Woolf (1979) 9 Fam. Law 216.

(ii) Depravity of the respondent

20. The difficulty in deciding whether a case is one of exceptional hardship centres largely on the requirement that the hardship be exceptional; the difficulty in deciding whether a case is one of exceptional depravity, on the other hand, is based more on uncertainty as to what conduct on the part of the respondent can properly be described as depraved. For whereas "hardship" is a familiar word, the word "depravity" has fallen out of general use, and (it has been said) now conveys only a vague idea of very unpleasant conduct.[74] There is authority for the proposition that the expression is not confined to sexual depravity or perversions;[75] and in Bowman v. Bowman[76] Denning L.J. gave a series of examples of conduct which, in his view, would or would not satisfy the requirement of exceptional depravity, differentiating for example between adultery of the normal kind which would not suffice, and adultery in aggravated circumstances[77] which might do so. However in Blackwell v. Blackwell[78] doubt was cast on the value of such guidelines; for a man to commit adultery two months after the marriage and leave the wife for another woman was said to amount simply to "extremely bad

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74 C. v. C. (Divorce: Exceptional Hardship) [1979] 2 W.L.R. 95.

75 G. v. G. (1968) 112 S.J.481.

76 [1949] P.353, 357.

77 For example, adultery committed within a few weeks of marriage or promiscuous adultery or adultery committed with the wife's sister or with a servant in the home. See also G. v. G. (1968) 112 S.J. 481 (a doctor's adultery with a patient) and V. v. V. [1966] 1 W.L.R. 1589 (adultery on the couch in the matrimonial home). In both these cases leave was given; however in both cases violence was also alleged.

78 (1973) 117 S.J. 939; see para. 18, above. In C. v. C. (Divorce: Exceptional Hardship) [1979] 2 W.L.R. 95, 97 Ormrod L.J. said that it was "unlikely" that the meaning of 'depravity' and 'exceptional depravity' suggested by Denning L.J. in Bowman v. Bowman "would find much support today".

adulterous conduct"[79] which did not constitute exceptional depravity.[80] Little confident guidance can therefore be given about the meaning of "depravity"; it is, however, clear that, as in cases alleging exceptional hardship, the depravity has to be exceptional: an ordinary though bad case of cruelty or "behaviour" does not suffice.[81]

21. In C. v. C. (Divorce: Exceptional Hardship)[82] the Court of Appeal held that the facts of that case (summarised at paragraph 19 above) justified the granting of leave to petition based on exceptional hardship to the wife, but did not justify a finding that the case was one of exceptional depravity on the part of the husband. We have already pointed out[83] that the case may increase the likelihood of applications being successfully founded on hardship; conversely, it seems to diminish the likelihood of decisions being based on depravity, since in virtually all cases the effect on the applicant of any conduct which might arguably fall within that description will constitute exceptional hardship.

22. The fact that the courts are unlikely to rely on "exceptional depravity" does not, however, mean that the formula is no longer of importance. So long as it still

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79 Ibid., per Davies L.J.

80 For an example where exceptional depravity has been held to have been established, see Fenton Davies v. Fenton Davies, The Times 10 Nov. 1956, where a husband was convicted and imprisoned for offences committed early in the marriage; the applicant wife believed him to be of good character and was herself suspected and questioned by the police. See also an unreported case where the respondent had been convicted of robbery with violence (see Rayden on Divorce, 13th ed. vol. 1 p.319).

81 See, e.g., Brewer v. Brewer [1964] 1 W.L.R. 403.

82 [1979] 2 W.L.R. 95.

83 See para. 19, above.

exists as a statutory ground for obtaining leave, applicants will inevitably still be advised to set out in detail all the facts, however unpleasant, which could possibly constitute depravity even if the courts in practice will usually regard them as going to proof of exceptional hardship. It follows that under the present law any would-be petitioner for divorce during the first three years of the marriage is in effect compelled to muster as much "dirt" and other unpleasant material as possible about the other spouse's conduct and to set it out in detail in an affidavit.[84]

(3) The working of the rule under the "breakdown" principle of divorce

23. The Divorce Reform Act 1969 entirely altered the conceptual basis of divorce: there is now one ground, and one ground only, on which the court has power to dissolve a marriage, and that is that the marriage has broken down irretrievably.[85] The law now "aims, in all other than exceptional circumstances, to crush the empty shells of dead marriages".[86] Much of the criticism of the three year rule centres on its alleged incompatibility with this philosophy of the modern code of divorce

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84 In such cases the applicant will normally base his intended petition on the "fact" that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him: Matrimonial Causes Act 1973, s.1 (2)(b). Allegations about conduct will thus be inevitable. Nevertheless, the wish to establish "exceptional" behaviour in the application for leave seems likely to exacerbate hostility between the parties to a greater extent than the need to establish "behaviour".

85 Grenfell v. Grenfell [1978] Fam. 128, 140 per Ormrod L.J.

86 Reiterbund v. Reiterbund [1974] 1 W.L.R. 788, 798 per Finer J.

and other matrimonial relief. In particular, it is said that the rule is inconsistent with the policy that once the real relationship of husband-and-wife has gone for good, the legal relationship of husband-and-wife should as far as possible be removed "so as to bring the legal situation into line with the factual situation".[87] It is also claimed that the need to allege exceptional hardship or exceptional depravity is incompatible with the policy of the law that a marriage which has in fact irretrievably broken down should be dissolved "with the minimum bitterness, distress and humiliation".[88] In order to provide a basis for evaluating these and other criticisms we think it necessary to give a brief account of the law now governing the availability of divorce. Further, to put the matter in context, we then give a brief account of other matrimonial remedies, not subject to the three year restriction, which may be used as an alternative to divorce to provide relief within the first three years of a marriage. The remedies in question are (i) judicial separation; (ii) orders excluding one spouse from the matrimonial home; and (iii) orders for financial relief and custody.

(a) Divorce - the ground

24. Although the Divorce Reform Act 1969 (now the Matrimonial Causes Act 1973) provides a sole ground for divorce (that the marriage has broken down irretrievably[89]) the court cannot hold that the marriage has broken down irretrievably unless the petitioner establishes one or more of the following facts:[90]

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87 Rukat v. Rukat [1975] Fam. 63, 74 per Ormrod L.J.

88 The policy adopted in The Field of Choice Law Com. No. 6 (1966) Cmnd.3123, para. 15.

89 Matrimonial Causes Act 1973, s.1(1), replacing Divorce Reform Act 1969, s.1.

90 Matrimonial Causes Act 1973, s.1 (2).

(i) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(ii) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(iii) that the respondent has deserted the petitioner for a continuous period of at at least two years immediately preceding the presentation of the petition;

(iv) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;

(v) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

If one or more of these facts is proved there is a presumption that the marriage has broken down irretrievably: only if the court is satisfied that there has been no irretrievable breakdown[91] will it refuse to grant

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91 Ibid., s.1(4). It is rare for a decree to be refused in these circumstances; but in Biggs v. Biggs and Wheatley [1977] Fam. 1, 11 an application to make absolute a decree nisi was dismissed, inter alia, because the marriage had not at the time of the application broken down irretrievably, the parties having lived together since decree nisi. See also Smith v. Smith (1979) Sept. L.A.G. Bulletin 213 where a judge had dismissed a wife's petition because, although she had established the "behaviour" fact, she had not established irretrievable breakdown of marriage; the Court of Appeal allowed her appeal because the husband had not discharged the burden of proving that the marriage had not broken down even though the wife had returned to live in the house for a few weeks and the husband had asserted that there was "life in the marriage yet".

a decree.[92]

25. In practice, the three year rule may thus operate to postpone the dissolution of marriages where irretrievable breakdown is evidenced by adultery, behaviour, desertion and two years' separation with the respondent's consent. It obviously has no bearing on cases where the petition is based on five years' separation.

(b) Divorce - the special procedure

26. The Divorce Reform Act 1969 thus made a fundamental conceptual change in the substance of the divorce law; but the extension of the so-called "special procedure" to all undefended divorce cases may, in the long term, have an even more profound effect on attitudes to divorce. The procedure is certainly of great importance in any consideration of the role of the three year restriction, for that restriction at least ensures that an application for leave to present a petition for divorce within the period is considered by a judge, who is statutorily required to have regard to the question whether there is reasonable probability of a reconciliation between the parties.[93] If the three year restriction were simply abolished, an undefended divorce

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92 In exceptional circumstances a decree may be refused even if the ground has been established. Under section 5 of the Matrimonial Causes Act 1973 the court may dismiss a petition based on 5 years living apart if the respondent establishes that dissolution would result in grave financial or other hardship to the respondent and the court is of opinion that it would be "wrong in all the circumstances" to dissolve the marriage. There are few cases in which this defence has been successfully relied on: see S.M. Cretney, Principles of Family Law (3rd ed.) pp.142-151. Furthermore the making of a decree absolute can also be refused or postponed if the judge is not satisfied about the arrangements for any minor children of the family or, in some cases, financial matters: see Matrimonial Causes Act 1973, ss. 10, 41.

93 Matrimonial Causes Act 1973, s. 3(2).

petition presented perhaps within days of the marriage would be dealt with under the special procedure. Under this procedure the process of adjudication (it has been said) has been transferred from the judge to the registrar,[94] and the registrar's duties are limited to deciding (on the basis of largely standardised written documents) that the petitioner has sufficiently proved the contents of the petition and is entitled to the relief sought.[95] The final pronouncement of a decree by the judge cannot be regarded as more than a formality;[96] and the granting of a divorce decree has thus become, in uncontested cases, an essentially administrative act. Since we think it likely that some of those who might have doubts about the utility of the existing three year restriction on petitions would nevertheless not wish divorce to be granted within a short time of the marriage under a procedure which seems to involve "rubber-stamping" as opposed to "judicial care"[97] we think that we should outline the working of this procedure.

27. It should perhaps be said at the outset that the expression "special procedure" has, in the words of Ormrod L.J.,[98] "become a complete misnomer." For - "It is no longer the 'special procedure'; it is now the ordinary procedure for dealing with undefended cases of all kinds ...".

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94 Day v. Day [1979] 2 W.L.R. 681, 683 per Ormrod L.J.

95 Matrimonial Causes Rules 1977 (S.I. 1977 No. 344) r.48(1)(a).

96 Day v. Day [1979] 2 W.L.R. 681, 684 per Ormrod L.J.

97 Cf. Santos v. Santos [1972] Fam. 247, 264 per Sachs L.J., and see also Sandholm v. Sandholm, The Times 21 December 1979.

98 Day v. Day [1979] 2 W.L.R. 681, 683.

In 1978, for example, out of a total of 151,533 decrees nisi of divorce, 147,602 (that is, 97.4 per cent.) were granted under the special procedure.[99]

28. All divorce suits are started by the filing of a divorce petition[100] at the court office of any divorce county court.[101] The petition must contain specified information.[102] It will be served on the other party,[103] together with a statement containing the petitioner's proposals for the care of any children,[104] and forms of notice of proceedings and acknowledgment of service.[105] These forms tell the respondent what he must do if he wishes to defend the suit, and provide information about the various steps he can take. If the respondent does defend (by filing an answer) the case will be transferred to the High Court[106] and the "special procedure" ceases to apply. It is essential that an answer

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99 Judicial Statistics (1978) Cmnd. 7627, Table D.8 (c) and (e). The "special procedure" was first introduced in 1973, when it was confined to undefended cases based solely on the two years living apart fact provided that there were no "children of the family", arrangements for whom had to be certified by the court: Matrimonial Causes (Amendment No. 2) Rules 1973 (S.I. 1973, No. 1413) rr.2,5. In 1975 the procedure was made available to proceedings based on any fact (except "behaviour") where there were no such children: Matrimonial Causes (Amendment) Rules 1975 (S.I. 1975, No. 1359) r.3. It was extended to all undefended cases in 1977, whether or not children are involved: Matrimonial Causes Rules 1977 (S.I. 1977, No. 344) rr.33(3), 48.

100 Matrimonial Causes Rules 1977, r.8(1).

101 Ibid., r.12(1).

102 Ibid., r.9, and App.2.

103 Or parties; e.g. if the petition charges adultery the alleged adulterer is a co-respondent: rr.13(1), 14.

104 Ibid., r.8 (2) and App.1, Form 4.

105 Ibid., r.12(6), and App.1, Forms 5 and 6.

106 Ibid., r.18(5). Cases may be transferred to the High Court in certain other circumstances: ibid., r.32; r.80(1).

be filed if the petition is to be treated as defended; if notice of intention to defend is not followed by the filing of an answer within the prescribed time the special procedure still applies.[107] Once the time for filing a defence has gone by,[108] the petitioner will make a written request for directions in the prescribed form accompanied by an affidavit and completed questionnaire as set out in the Rules, in order to prove the "fact" on which the petitioner relies.[109] The necessary forms are supplied automatically to the petitioner by the court. On receipt of these documents, correctly completed, the registrar enters the case in the "special procedure list."[110] As soon as practicable thereafter, the registrar must consider the evidence filed by the petitioner;[111] if he is satisfied that the petitioner has sufficiently proved the contents of the petition and is entitled to a decree, the registrar makes and files a certificate to that effect.[112] A date is then fixed for the pronouncement of a decree nisi by a judge in open court at a court of trial; the parties are notified of this date but it is specifically provided that it is not necessary for any party to appear.[113] The pronouncement of decrees is "in bulk" (the judge simply saying "I pronounce decree nisi in cases 1 to 50").[114]

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107 Day v. Day [1979] 2 W.L.R. 681, 685 per Ormrod L.J.; Sandholm v. Sandholm, The Times 21 December 1979.

108 See the definition of "undefended cause" in Matrimonial Causes Rules 1977 r.2(2). If the case is defended, the registrar will give directions for trial: ibid., r.33(4).

109 Ibid., r.33(3), and App.1, Form 7.

110 Ibid., r.33(3).

111 Ibid., r.48(1).

112 Ibid., r.48(1)(a). If he is not so satisfied he may give the petitioner the opportunity of filing further evidence or remove the case from the special procedure list.

113 Ibid., r.48(2).

114 This aspect of the procedure is governed by an unreported Registrar's Direction of 22 May 1978, referred to in Day v. Day [1979] 2 W.L.R. 681, 684.

29. The decree nisi does not legally[115] terminate the marriage; for this purpose it must be made absolute. This may be done six weeks after the decree nisi has been pronounced[116] on the application of the party who has been granted the decree.[117] If there are children of the family in respect of the arrangements for whose welfare the court has to declare its satisfaction[118] the registrar, after filing his certificate that the petitioner is entitled to a decree,[119] will fix an appointment for consideration by a judge in chambers of the proposed arrangements and send notice of the appointment to the parties.[120] In practice, the appointment will normally be for the day on which the judge has pronounced the decree nisi in the case. There is no statistical evidence about the number of cases in which the parties actually attend.

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115 Although it effectively does so for practical purposes: Fender v. St.-John Mildmay [1938] A.C.1. The making of a decree nisi also has some legal consequences (e.g. a husband may thereafter be convicted of rape on his wife: R. v. O'Brien [1974] 3 All E.R. 663). For illustrations of the legal theory, see In re Seaford dec'd [1968] P.53; Biggs v. Biggs [1977] Fam. 1.

116 The court has power to make a decree absolute within a shorter period, but will rarely do so: see Matrimonial Causes Act 1973, s.1 (5); Matrimonial Causes (Decree Absolute) General Order 1972; Practice Note (Divorce: Decree Absolute) [1972] 1 W.L.R. 1261.

117 The other party may apply for the decree to be made absolute but not until 3 months after the expiry of the 6 week period: Matrimonial Causes Act 1973, s.9(2).

118 Ibid., s.41 (1).

119 Under the Matrimonial Causes Rules 1977, r.48(1).

120 Ibid., r.48(4).

30. The introduction of the "special procedure" in all undefended cases was accompanied by withdrawal of legal aid in such cases. Under the Legal Aid (Matrimonial Proceedings) Regulations 1977[121] legal aid is only available for divorce (or judicial separation) where the proceedings are defended, where the petition is directed to be heard in open court, or where an applicant cannot proceed without legal aid because of incapacity.[122] Legal aid is, however, available in relation to injunctions, financial and property matters, contested applications relating to children, and also for applications for leave to present a petition within three years of marriage.[123] Moreover, the Green Form scheme[124] permits legal advice (for those eligible on financial grounds) to be given within financial limits.[125]

(c) Alternative forms of relief

31. We now turn to examine alternative forms of matrimonial relief in respect of which there is no time restriction.

(i) Judicial separation

32. A petition for judicial separation may be presented to the court by either party to a marriage; there is no time restriction. If the petitioner establishes any of the "facts"[126]

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121 S.I. 1977 No. 447.

122 Ibid., r.2.

123 Ibid., r.3.

124 See Legal Aid Act 1974, s.15.

125 At present £25: ibid., s.3(2) and Legal Aid Act 1979, s.2. However we understand that solicitors acting for petitioners (but not respondents) may incur up to £55 (as from 1 August 1979) without special authority.

126 I.e. adultery etc., behaviour, desertion, living apart: see para. 24, above.

from which, in divorce proceedings, irretrievable breakdown of a marriage may be presumed, the court is bound[127] to grant a decree.[128] It is specifically provided that in judicial separation proceedings the court is not concerned to consider whether the marriage has broken down irretrievably.[129]

33. The primary legal effect of the making of a decree of judicial separation is that it thereupon ceases to be obligatory for the petitioner to cohabit with the respondent.[130] The decree is not an order that one party shall cease to live with the other,[131] and it does not by itself provide any significant protection[132] to a wife who has been subjected to ill treatment by her husband.[133] In that respect, therefore, the effect of a decree of judicial separation is less than the name suggests; yet in other respects the effects are perhaps surprisingly extensive. In particular, on granting the decree or at any time thereafter, the court may make any of the financial provision or property adjustment orders which it has power to make in divorce suits.[134] Furthermore, for the purposes of intestate succession a decree of judicial

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127 Provided that it has made the appropriate declaration about the arrangements made for the welfare of any children of the family: Matrimonial Causes Act 1973, s.41.

128 Ibid., s.17(2).

129 Ibid.

130 Ibid., s.18(1).

131 Montgomery v. Montgomery [1965] P.46, 51 per Ormrod J.

132 Such protection can be given if the court makes an injunction restraining the husband from molesting the wife, or excluding him from the former matrimonial home; but it is not now necessary to start judicial separation (or any other matrimonial proceedings) as a pre-condition to the grant of such an injunction: see para. 35, below.

133 See, e.g., the facts of Bradley v. Bradley [1973] 1 W.L.R. 1291.

134 Matrimonial Causes Act 1973, ss. 21-24.

separation operates in the same way as a divorce[135] and thereafter neither spouse has any right to succeed on the other's intestacy; a wife separated under a decree of judicial separation is only eligible for the level of financial provision applicable to a former wife in proceedings for financial provision out of her deceased husband's estate.[136] The really important difference between a decree absolute of divorce and a decree of judicial separation is that the latter does not terminate the status of marriage subsisting between the parties: hence, although a judicial separation decree may now have many[137] of the financial and other consequences of divorce, it does not permit the parties to re-marry.[138]

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135 Ibid., s.18(2).

136 Inheritance (Provision for Family and Dependants) Act 1975, s.1(2)(a).

137 But not all. For example, a woman who is judicially separated will still be eligible to take benefits available to a "widow" under an occupational pensions scheme (whereas a divorced woman would not qualify).

138 It is noteworthy that a large number of divorced persons re-marry, often shortly after the decree. In a sample of marriages dissolved in 1973 it has been shown that in over 75% of the cases at least one party had re-married 4 years later; and about $\frac{1}{3}$ of those who had re-married did so within 3 months from the divorce. ("Population Trends 16", Summer 1979, Office of Population Censuses and Surveys.)

34. In recent years there has been a significant increase in the number of petitions for judicial separation: [139]

Petitions				Grounds					Total Decrees
Year	Total Petitions	By Husbands	By Wives	Adultery	Behaviour	Desertion	2 years living apart	5 years living apart	
1971	211	10	201	63	111	3	-	1	38
1972	330	23	307	71	204	15	2	5	115
1973	430	20	410	85	284	8	2	5	190
1974	696	48	648	118	464	22	6	6	245
1975	936	52	884	124	717	59	4	3	323
1976	1,601	63	1,538	250	1,190	9	3	3	584
1977	1,980	137	1,843	298	1,507	12	9	3	761
1978	2,611	239	2,372	554	1,812	(Figures not available)			1,228

It will be noted that the great majority of petitioners are wives, that "behaviour" is the ground most commonly relied on, and that a significant number of petitions do not result in the making of a decree. Little is known about the reasons for the increased use of judicial separation petitions; at our suggestion, research is likely to be undertaken in the near future aimed at throwing light on this matter. We imagine

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139 This table is based on the Civil Judicial Statistics for each relevant year. It should be noted that the figures given for "grounds" do not include cases where two or more grounds are alleged. It will also be noted that the figures for 1978 are incomplete. This is because Table D.8(b) of the Judicial Statistics 1978 for the first time does not give a complete analysis of the figures for petitions on grounds other than adultery and behaviour.

that there are some cases where, for religious or other reasons, the parties do not want a divorce and resort to judicial separation as a long term remedy to deal with financial and custody matters; but it is reasonable to suppose that, in some cases at least, the parties intend to divorce as soon as three years have elapsed from the date of the marriage and use judicial separation as a temporary measure.

(ii) Orders excluding a spouse from the matrimonial home

35. Until 1976 the only widely used and effective procedure available to a spouse seeking a court order against molestation or violence was to apply to the divorce court for an interlocutory injunction. However, a spouse could not simply apply for an injunction; he or she had also to start (or undertake to start) divorce, nullity, or judicial separation proceedings, or proceedings for leave to present a divorce petition within three years of the marriage,[140] because the court would only grant an injunction as relief ancillary to other proceedings. This state of affairs was the subject of much criticism; it was said (amongst other things) that the result was to drive women into divorce proceedings because this was the only way of getting protection against violence.[141] Since the enactment of the Domestic Violence and Matrimonial Proceedings Act 1976 the old rule has ceased to be of any practical relevance, because courts may,

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140 McGibbon v. McGibbon [1973] Fam. 170.

141 See the evidence given by Sir George Baker P. in the Report from the Select Committee on Violence in Marriage (1975) vol. 2 H.C. 553-II, q. 1822, p.468.

under the 1976 Act, grant injunctions against molestation and injunctions excluding a spouse from the matrimonial home "whether or not any other relief is sought in the proceedings".[142] Furthermore, the Domestic Proceedings and Magistrates' Courts Act 1978[143] gives magistrates' courts the power to make personal protection and exclusion orders against a party to a marriage at the suit of the other.

36. In the result, it is not now necessary to undertake to institute judicial separation proceedings or proceedings for leave to present a divorce petition within three years of the marriage as a preliminary to securing legally effective interim remedies against violence or molestation. If a long term remedy is sought, it may be preferable to institute judicial separation proceedings, since the remedies available under the 1976 Act are essentially short term and somewhat limited in scope.[144]

(iii) Financial relief and custody

37. It is not necessary to start divorce proceedings in order to obtain an order for financial relief. In judicial separation the same range of orders is available as in divorce.

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142 Domestic Violence and Matrimonial Proceedings Act 1976, s.1(1). The Act contains other provisions designed to give legal protection against violence and molestation in the domestic context.

143 Sect. 16(2), implementing the proposals in the Commission's Report on Matrimonial Proceedings in Magistrates' Courts, Law Com. No. 77 (1976) para. 3.40.

144 Hopper v. Hopper (Note) [1978] 1 W.L.R. 1342. Furthermore, there is no power under the 1976 Act to make orders for custody or financial relief.

Furthermore, proceedings may be started in the divorce court for financial relief on the ground of failure to provide reasonable maintenance;[145] and magistrates' courts also have a jurisdiction, though somewhat less extensive, to make financial orders on that and a number of other grounds.[146]

38. Orders for custody and access can be sought in the divorce court[147] in judicial separation and maintenance proceedings, and in a magistrates' court in proceedings under the Domestic Proceedings and Magistrates' Courts Act 1978.[148] Such orders may also be made by the High Court, county court and magistrates' court in proceedings under the Guardianship of Minors Acts 1971 and 1973.[149]

(4) The working of the restriction in practice

39. We now turn to consider the statistical material which is available about the working of the restriction on the presentation of divorce petitions within three years of the marriage. The Judicial Statistics show that applications for leave have greatly increased in recent years. In 1969 there were only 498 applications;[150] in 1971 (the first year in which the Divorce Reform Act 1969 was in force) there were

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145 Matrimonial Causes Act 1973, s.27 (this section will be amended by the Domestic Proceedings and Magistrates' Courts Act 1978, s.63(1), which is not yet in force).

146 Domestic Proceedings and Magistrates' Courts Act 1978, ss.2, 6 and 7. These provisions (which will replace those in the Matrimonial Proceedings (Magistrates' Courts) Act 1960) are not yet in force.

147 Matrimonial Causes Act 1973, s.42.

148 Sects. 8-12.

149 Financial orders in respect of children may also be made under this and the other procedures mentioned in the text.

150 Civil Judicial Statistics 1969 (Cmnd.4416) Table 10(D).

530;[151] in 1973 there were 786;[152] and in 1978 the number had risen to 1,462.[153] This increase is far greater than the proportionate increase in the number of divorce petitions: between 1973[154] and 1978 the proportionate increase in the number of applications for leave was 86 per cent., whereas the proportionate increase in the number of divorce petitions was 41.2 per cent.[155]

40. The statistics also show that most applications for leave are successful. Thus in 1975, out of a total of 576 cases adjudicated upon, leave was refused in 31 cases (5.39 per cent.);[156] the proportion of refusals in 1974 and 1973 respectively was 8.16 per cent. and 6.77 per cent.[157] Unfortunately publication of statistics relating to the refusal of leave was discontinued in 1975 but we understand from enquiries made in the Principal Registry of the Family Division and certain county courts that the proportion of refusals is probably in the region of 5 per cent. These figures do not, of course, show that the restriction is ineffective in helping to prevent dissolutions within three years of the marriage since there will no doubt be cases where applicants are advised not to apply for leave because it is thought that leave will be refused.

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151 Civil Judicial Statistics 1971 (Cmnd.4982) Table 10(D). (The reference in the Table to s.2 of the Matrimonial Causes Act 1950 should be a reference to s.2 of the Matrimonial Causes Act 1965.)

152 Civil Judicial Statistics 1973 (Cmnd.5756) Table 10(D).

153 Judicial Statistics 1978 (Cmnd.7627) Table D.8(e).

154 This year has been chosen as the base for comparison to eliminate any distortion caused by exceptional figures in 1971, the first year of the operation of the Divorce Reform Act 1969.

155 115,048 petitions in 1973; 162,450 petitions in 1978.

156 Judicial Statistics 1975 (Cmnd.6634) Table C.12(vi).

157 Civil Judicial Statistics 1974 (Cmnd.6361) and 1973 (Cmnd.5756) Tables B.12(v) and 10(D) respectively.

41. The statistics cannot give any direct information about the effect of the existence of the restriction on the long-term divorce rate. It is however possible to draw certain inferences from a comparison of the divorce statistics for England and Wales with those for Scotland, where there is no time restriction on the presentation of divorce petitions. We deal with these matters in discussing the arguments for and against retention of the existing restriction at paragraphs 46-57, below.

(5) Time restrictions elsewhere in the United Kingdom

(a) Scotland

42. There is no time restriction in the law of Scotland such as there is in English law, so that in Scotland a divorce petition may be presented at any time. This is the more striking since, as a result of the Divorce (Scotland) Act 1976 (which came into force on 1 January 1977) the Scottish law of divorce has in other respects been brought substantially into line with English law: in particular the facts upon which irretrievable breakdown is based are similar.[158] We therefore consider that it is worth setting out the reasons why the difference between the two countries in relation to the time restriction has arisen.

43. The possibility of adopting the three year restriction as part of the law of Scotland has been twice considered in

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158 Irretrievable breakdown in Scotland is taken to be established (subject to one or two exceptions) if one or more "facts" are proved (Divorce (Scotland) Act 1976, s.1(2)). There is no provision akin to s.1(4) of the Matrimonial Causes Act 1973 requiring a court to dismiss a petition if, notwithstanding the proof of a fact, it is satisfied that the marriage has not broken down irretrievably. There are also other differences of detail between the relevant provisions of the two Acts.

recent years: first by the Morton Commission[159] in 1956 and secondly in the Scottish Law Commission's Report: Divorce - The Grounds Considered,[160] in 1967. Both bodies rejected the introduction of a rule restricting divorce petitions within the early years of marriage. The Morton Commission said:

> "In Scotland, an action for divorce may be raised at any time after the marriage. We do not consider it necessary to introduce into Scotland a restriction similar to that in England. In 1954, the number of divorces granted ... in respect of marriages which had not lasted more than three years was 55, out of a total number of divorces for that year of 2,200.[161] From that number must be taken those cases in which, had there been a restriction, the pursuer would in any event have been allowed to raise an action. We consider, therefore, that there is not a problem in Scotland sufficiently large to justify such an innovation; and there was little evidence in support of such a proposal from the Scottish witnesses".[162]

44. In 1967 the Scottish Law Commission[163] went further, and suggested that the operation of the rule in England and Wales gave little support to the view that the existence of a time restriction made any material contribution towards the objectives of a good divorce law, namely the support of marriages which have a chance of survival and the decent burial with the minimum of embarrassment, humiliation and bitterness

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159 (1956) Cmd. 9678: see para.8, above in relation to the Commission's recommendation as to English law.

160 (1967) Cmnd.3256.

161 I.e. 2.5 per cent. In 1977 there were 624 divorces in respect of marriages that had lasted for less than 3 years out of a total of 8,807 divorces (i.e. 7.08 per cent.): (1977) Annual Report of the Registrar General for Scotland, Part 2, Population and Vital Statistics, p.144 (H.M.S.O.). The corresponding figures for England and Wales were 1,406 out of 129,053 (1.1 per cent.): 1977 Marriage and Divorce Statistics, Series F.M.2 No. 4 (O.P.C.S.).

162 (1956) Cmd. 9678, Ch. 5, para.218. The Morton Commission seemed to regard the problem of early marital breakdown as more serious in England: see para.8, above.

163 Divorce - The Grounds Considered (1967) Cmnd.3256.

of those that are indubitably dead. The Scottish Law Commission thought that there was "little to suggest" that the restriction encouraged -

> "husbands and wives to face and resolve their differences in the period of adjustment which necessarily follows marriage .... In Scotland only 8.27 per cent. of the marriages dissolved by divorce in 1964 had lasted less than three years.[164] In some of these cases, had they arisen in England, discretion would have been exercised; the remaining number is not substantial, and there is little reason to think that any of them would have survived if the parties had been obliged to postpone proceedings. On the other hand, it seems clear to us that, where the spouses' incompatibility is revealed during the early days of marriage, the balance of social advantage clearly lies with the speedy termination of the marriage. This is not to approve irresponsible or trial marriages. Most persons, as we have pointed out, enter into marriage without considering the terms of the law of divorce and upon the assumption that their relationship will be permanent".[165]

The Scottish experience is of particular significance in evaluating the effectiveness of the time restriction. We return at paragraph 48 below to the question of whether a comparison between the divorce rates in the two countries provides any useful evidence about the likely effect of abolition of the rule in England.

(b) Northern Ireland

45. For the sake of completeness we also briefly summarise the position in Northern Ireland. Until April 1979 there was a three year rule in Northern Ireland under section 5 of the Matrimonial Causes Act 1939 which differed in two significant respects from the rule in England and Wales.

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164 In 1977 the percentage was 7.08: see n.161, above.

165 Divorce - The Grounds Considered Scot. Law Com. No. 6 (1967) Cmnd.3256, para.30.

First, the bar was on the granting of a decree nisi of divorce,[166] not on the presentation of a petition. Secondly, the bar applied only in a case of cruelty:[167] thus, had a case arisen in Northern Ireland on facts similar to those in Blackwell v. Blackwell[168] there would have been no bar there because adultery was the fact alleged in that case. Under the Matrimonial Causes (Northern Ireland) Order 1978,[169] however, the divorce law of Northern Ireland was brought substantially into line with that of England and Wales. Thus, while the divorce law in general has been liberalised, the three year rule has been tightened: the restriction on divorce within three years of marriage now applies to the presentation of a petition, not to the granting of a decree (thus delaying proceedings by a further few months), and it applies whatever facts are alleged to constitute irretrievable breakdown.[170]

(6) Criticism of the present rule

46. Criticism of the restriction takes two main forms. First, there are those who deny that any time restriction on the presentation of divorce petitions would serve a useful

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166 The proviso to s.5 of the Act restricted the pronouncement of a decree (i.e. decree nisi). In Martin v. Martin [1941] N.I.1 where the petitioner failed to establish exceptional hardship or depravity, although she proved cruelty, it was made clear that the case would have to be re-heard after the end of the period before a decree could be pronounced (ibid., at p.17 per Murphy L.J.).

167 The matrimonial offence grounds existed under the 1939 Act in a form similar to that under the 1937 Act in England.

168 (1973) 117 S.J. 939: see para.18, above.

169 S.I. 1978 No. 1045.

170 See Matrimonial Causes (Northern Ireland) Order 1978, Art. 5.

purpose. Secondly, there are those who are prepared to accept that there is a case for some time restriction, but object to the present rule. We outline these criticisms in turn.

(a) Objections to any time restriction

47. Objections to the existence of any time restriction centre on the alleged inconsistency of such a restriction with the present policy of the divorce legislation. If it is the case that divorce should be available whenever a marriage has irretrievably broken down, why (it is said) should it matter whether the marriage has been in existence for three months or three years? Separation is often thought to be the best evidence of breakdown, and the passing of time the most reliable indication that it is irretrievable.[171] Parliament has decided that two years' separation suffices to establish a prima facie case of breakdown.[172] Why, then, should divorce be withheld in some cases because of the irrelevant fact that the parties have been married for less than three years? Again, if a petition is based on the "fact" that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him,[173] a court would no doubt properly take the duration of the marriage into account in deciding whether or not that fact had been established; this is because it can reasonably be expected that a couple will in the early years of marriage need to adjust themselves to the idiosyncracies of each other's behaviour. If the court is satisfied, taking into account the whole of the circumstances, that the petitioner cannot reasonably be expected to live with the respondent, why should divorce be postponed?

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171 Pheasant v. Pheasant [1972] Fam. 202, 207 per Ormrod J.

172 Provided that the separation constitutes desertion, or that the respondent consents to the granting of a decree: Matrimonial Causes Act 1973, s.1(2)(c) and (d).

173 Ibid., s.1(2)(b).

48. Those who take this view might well be prepared to modify it, in spite of the apparent injustice to individuals who are denied immediate divorce notwithstanding the irretrievable breakdown of their marriage, if it could be shown that the rule does in fact operate as an external buttress to the stability of marriage. But critics usually claim that the existence of the restriction has little or no effect on the long term rate of marital dissolution and merely postpones divorces. This claim derives some support from a comparison of the English and Scottish divorce rates in respect of marriages dissolved by the end of the tenth year.[174] We set out below tables showing the duration of marriages dissolved in respect of both countries.[175] A comparative graph then follows.

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174 This is, we think, a suitable period over which to compare the effect of the rule relating to the first 3 years of marriage.

175 These figures relate to decrees granted in the two countries in the year 1977.

TABLE

ANNUAL DIVORCE RATES IN ENGLAND AND WALES AND IN SCOTLAND AS A PROPORTION OF ALL MARRIAGES DISSOLVED WITHIN THE FIRST TEN YEARS

A: SCOTLAND (1977)[176]

Year of Marriage	Divorce decrees	Annual percentage of dissolutions as a proportion of all dissolutions within ten years	Cumulative annual percentage of dissolutions as a proportion of all dissolutions within ten years
1st	17	0.4	0.4
2nd	179	4.2	4.6
3rd	428	10.04	14.63
4th	544	12.75	27.39
5th	615	14.42	41.81
6th	596	13.97	55.78
7th	558	13.08	68.86
8th	476	11.16	80.02
9th	436	10.22	90.25
10th	416	9.75	100
Total	4,265		

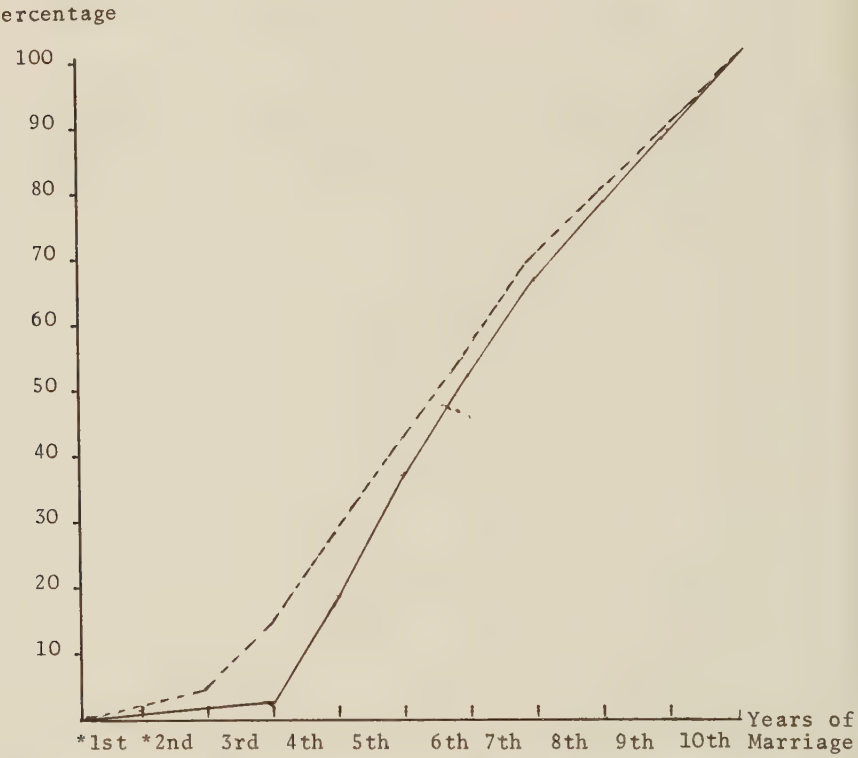
176 (1977) Annual Report of the Registrar General for Scotland Part 2, Population and Vital Statistics, p.144 (H.M.S.O.). Figures are correct to two figures of decimals.

B: ENGLAND AND WALES (1977)[177]

Year of Marriage	Divorce decrees	Annual percentage of dissolutions as a proportion of all dissolutions within ten years	Cumulative annual percentage of dissolutions as a proportion of all dissolutions within ten years
Up to 3rd	1,406	2.26	2.26
4th	10,286	16.51	18.77
5th	11,814	18.96	37.73
6th	9,394	15.08	52.81
7th	8,505	13.65	66.47
8th	7,774	12.48	78.94
9th	6,798	10.91	89.86
10th	6,319	10.14	100
Total	62,296		

177 (1977) Marriage and Divorce Statistics (Office of Population Censuses and Surveys) Series F.M.2 No. 4, Table 4.3.

1977 Divorce decrees by duration of marriage expressed as cumulative percentage of marriages dissolved within ten years[178]



* Figures for these years are only available for Scotland. The first figure (a cumulative one) for England and Wales is for the 3rd year.

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178 (1977) Annual Report of the Registrar General for Scotland, Part 2, Population and Vital Statistics, p.144 (H.M.S.O.); 1977 Marriage and Divorce Statistics (Office of Population Censuses and Surveys) Series F.M. 2 No. 4, Table 4.3.

49. It will be seen from the tables and the graph that in England and Wales the number of divorces in the first three years of marriage is low compared with that for subsequent years of marriage and that (as is to be expected given the existence of the three year restriction on divorce) the proportion is lower than that in Scotland for the same period. In England and Wales the figures, however, increase rapidly in the fourth and subsequent years; and by the seventh year the proportion of marriages ending in divorce in the two countries has become almost equal. This statistical comparison may well be thought to weaken the force of the argument that the three year restriction has a positive role in buttressing the institution of marriage.

50. If it be accepted that the main effect of the present restriction is to delay rather than prevent divorce, it would follow that the restriction only preserves, for an arbitrary period of time, the legal bond between some couples whose marriage has in fact irretrievably broken down. The restriction cannot compel them to live together, but it can and does prevent them from creating a new legally recognised relationship. This (it may be said) is tantamount to imposing a penalty for having made a mistaken choice of partner; and the penalty may in some cases be severe - for example, a wife deserted soon after marriage might wish to re-marry and have children; a wait of three years could make child-bearing difficult or dangerous for the mother and imperil the health of her child. Such cases undoubtedly involve hardship, but possibly not such as would qualify as "exceptional" for the purposes of an application for leave to present a petition within three years from the date of the marriage.

51. In addition to these arguments based on the possibility of hardship being caused in individual cases it is sometimes said that to keep in existence the "empty legal

shell"[179] of a marriage which has irretrievably broken down is undesirable, even when neither party has any immediate intention of re-marriage. As Lord Scarman has put it,

> "An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down".[180]

In this view, the imposition of an arbitrary period of delay may encourage the parties to dwell on the past, and not to face up to the reality that their marriage is over. They may thus lose the opportunity of finding happiness in another relationship. The delay may therefore encourage the formation of a soured and backward-looking attitude.

52. Critics also claim that there is an inconsistency between the law of divorce and nullity. Breakdown in the early years of marriage is often brought about by failure to establish the necessary minimum relationship physically and emotionally.[181] If sexual incompatibility results in a total failure to consummate the marriage, nullity proceedings can be started immediately,[182] but if there has been a single act of consummation nullity proceedings are not available, and divorce proceedings will (unless the court grants leave on the basis of exceptional hardship or depravity) have to be delayed until the three year period has expired.

53. There are two other more limited objections to a restriction on the presentation of divorce petitions which we should mention. First, it is said that the restriction,

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179 The Field of Choice Law Com. No. 6 (1966) Cmnd.3123, para.15: see n.30, above.

180 Minton v. Minton [1979] A.C. 593,608.

181 See J.G. Miller (1975) 4 Anglo-American L.R.163, 166, quoting J. Dominian, Marital Breakdown (1968) p.19.

182 And indeed should be started without delay if the risk that the petitioner will be held to have "approbated" the marriage is to be avoided: see Matrimonial Causes Act 1973, s.13(1).

because it runs from the date of the marriage, may operate harshly in cases where the parties have lived together for a substantial period before that date.[183] Secondly, it is said that although withholding divorce does not compel a married couple to cohabit, it may in practice make it difficult for them to separate. This may increase the risk that children will be born to a union which has in fact broken down.

(b) Objections to the formulation of the present restriction

54. The criticisms which we have outlined above would, if valid, extend to any time restriction on the presentation of divorce petitions. We now turn to a more limited criticism of the present rule, which is sometimes advanced even by those who accept in principle the case for a restriction. This criticism is founded on what has to be established if leave is to be obtained to present a petition within three years of the marriage. It is said that the need under the present law to focus attention on the respondent's conduct if a case of exceptional hardship or depravity is to be established is contrary to the spirit of the modern divorce law, and may cause the distress, bitterness and humiliation which it is the policy of the law to avoid.

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183 The incidence of pre-marital cohabitation is increasing. In a sample of women first married between 1971 and 1975, 9 per cent. had cohabited with their husbands before marriage compared with 1 per cent. of those married between 1956 and 1961: see Karen Dunnell, Family Formation 1976 (H.M.S.O. 1979) pp. 7-8. In a number of decided cases where leave to bring a petition was sought, including Blackwell v. Blackwell (1973) 111 S.J. 939 and C. v. C. (Divorce: Exceptional Hardship) [1979] 2 W.L.R. 95, the couples had cohabited for several years before marriage.

"Exceptional depravity" in particular seems to be a concept which should find no place in a divorce law designed to minimise bitterness and humiliation. It is true that cases will not now often be decided on the basis of depravity, but solicitors taking instructions will no doubt feel obliged to explore all the possibilities in order to establish a convincing case; indeed, proof of exceptional hardship tends to be related to the proof and effect of intolerable matrimonial conduct of one kind or another.[184] An applicant in order to obtain leave will thus have to set out in detail the most unpleasant allegations, and emphasise the exceptional nature of the case in a manner which is unlikely to assist either the petitioner or respondent to come to terms with the breakdown of their marriage, still less to encourage them to adopt a conciliatory attitude to the resolution of problems relating, for example, to the upbringing of their children. Whatever may be thought about the principle of some temporal restriction on the availability of divorce, the exceptions to the three year rule are (it is said) wholly inconsistent with the policy of the divorce law, particularly in so far as it seeks to encourage conciliation between the parties.

55. There is a further, albeit minor, objection to the present provision, which is that it involves a two-stage procedure: first, the applicant has to seek leave; secondly, if he obtains leave, he must file a petition in the normal way. This no doubt results in some increase in legal costs.

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184 See, e.g. Hillier v. Hillier and Latham [1958] P.186; Brewer v. Brewer [1964] 1 W.L.R. 403; C. v. C. (Divorce: Exceptional Hardship) [1979] 2 W.L.R. 95.

(7) The case for retention of a time restriction

56. Although put in a number of different ways, arguments in favour of a temporal restriction on the presentation of divorce petitions tend to be founded on the proposition that such a restriction has, or may have, a stabilising effect on marriages.[185] The object of a restriction, it has been said, is "not only to deter people from rushing into ill-advised marriages, but also to prevent them from rushing out of marriage so soon as they discovered that their marriage was not what they expected".[186] Those who take this view may well be unimpressed by statistical evidence which is said to show that the present restriction has little long term effect on the divorce rate,[187] not least because, it could be argued, such evidence by its nature cannot be conclusive as to the effect of a change in the law on future patterns of behaviour. Public knowledge of the existing restriction may well not be widespread, so that some at least of those who favour retention of the restriction might be prepared to agree that it has at the moment little specifically deterrent effect; but it can nevertheless plausibly be argued that any change in the law would inevitably be seen (whether rightly or wrongly) as making the availability of divorce even more of an easy formality. There would thus be a serious risk that any change in the law would itself contribute to an attitude of mind in which divorce comes to be regarded, not as the last resort, but as "the obvious way out when things begin to go wrong."[188]

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185 See Report of the Royal Commission on Marriage and Divorce (1956) Cmd. 9678, para.215.

186 Fisher v. Fisher [1948] P. 263, 264 per Bucknill L.J.

187 See para.48, above.

188 Report of the Royal Commission on Marriage and Divorce (1956) Cmd. 9678, para.47.

Those who take this position would no doubt draw attention to the significantly increasing divorce rate, and to the evidence that this now reflects an increase in the rate of marital breakdown;[189] and urge that retention of the restriction is sufficiently justified if it may have some general effect in preserving (or at least not further eroding) the concept of marriage as a life-long union.

57. This argument is thus essentially based on broad considerations of public policy; and some of those who adopt it might accept the traditional argument that the public interest in upholding the stability of marriage is so great as to make irrelevant the fact that retention of the restriction would cause hardship to some individuals; in this view "the happiness of some individuals must be sacrificed to the greater and more general good".[190] But it is not now necessary to accept this view, since it can persuasively be argued that the existence of a time restriction does not in fact now cause any real hardship or unhappiness to individuals, and certainly that the restriction does not cause sufficient hardship or unhappiness to justify taking any risk of further weakening the institution of marriage. The argument that the rule no longer causes significant unhappiness to individuals is founded on the fact that leave to present a petition will be granted where the

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189 Karen Dunnell, Family Formation 1976 (1979) p.35 and Table 7.2.

190 Evans v. Evans (1790) 1 Hag. Con. 35, 37 per Sir William Scott. The judgment contains one of the classic expositions of the argument against facilitating divorce:
"When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes." ibid., at p.36.

hardship is exceptional, and also that all that the law now withholds, in a case where the restriction operates, is the right, for a comparatively short period, to re-marry.[191] Alternative procedures (such as judicial separation and injunctions[192]) are available to provide all that the law can give by way of financial provision, and protection; and there are procedures which can be invoked to ensure that proper arrangements are made for any children. In this respect the impact of the restriction has been much reduced in recent years, because in 1970[193] the courts' powers to make financial orders in judicial separation proceedings were considerably extended. A decree of divorce now achieves nothing which cannot be achieved by other procedures which may be instituted at any time after the marriage, save that divorce alone provides a licence to re-marry. On this view it is not unreasonable that those "who have been so unwise in their choice of partners as to be confronted with an 'intolerable situation' within three years of marriage" should be debarred from re-marriage "without an interval for reflection".[194]

(8) The Field of Choice

58. We consider that the arguments in favour of making no change in the law, which we have tried to summarise in the preceding paragraphs, are clearly entitled to respect, and that in particular the difficulty of predicting the effect on public attitudes of any change in the law casts a heavy onus on those who seek to justify reform. On the other

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191. Although some people might attach importance to the fact that the law denies the psychological freedom from the bond of a dead marriage even to those who do not wish to re-marry.

192 See paras.32-36, above.

193 With the enactment of the Matrimonial Proceedings and Property Act 1970 (implementing the recommendations in the Law Commission's Report on Financial Provision in Matrimonial Proceedings, Law Com. No. 25 (1969)).

194 Putting Asunder, Appendix C., para.4.

hand, there is one factor which seems to us very strongly to support the case for change: this is the requirement under the present law to allege and prove exceptional hardship or depravity if leave is to be obtained to present a petition within three years of marriage. It may well be that the court, in deciding whether leave should be granted, will no longer rely on "exceptional depravity" with all its "unpleasant overtones and difficulties",[195] but (as we have pointed out)[196] this will not necessarily mitigate the effect of the statutory language on the applicant and his advisers. For whatever reason, a large number of applications for leave are now made each year and we do not think it consistent with the modern attitude to divorce[197] that those whose marriage has irretrievably broken down should be encouraged to make serious, and possibly hurtful and wounding, allegations against a partner. In particular this procedure seems quite incompatible with the policy that the law should "engender common sense, reasonableness and agreement in dealing with the consequences of estrangement."[198] This is especially important when these consequences include the need to make arrangements for the long-term welfare of children. Nevertheless we accept that there will be those who do not regard this as a sufficient justification for making a change in the law. The object of this working paper is to stimulate informed discussion and comment, and we hope that those who favour leaving the law as it is will give us their reasons.

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195 C. v. C. (Divorce: Exceptional Hardship) [1979] 2 W.L.R. 95, 98 per Ormrod L.J.

196 See para.54, above.

197 "Parliament has decreed: 'If the marriage has broken down irretrievably, let there be a divorce.' It carries no stigma, but only sympathy. It is a misfortune which befalls both. No longer is one guilty and the other innocent. No longer are there contested divorce suits ..." Wachtel v. Wachtel [1973] Fam.72, 89 per Lord Denning M.R.

198 Report of the Committee on One-Parent Families (1974) Cmnd.5629 para. 4.305.

59. Although it is our provisional view that some change is called for, we have not reached any conclusion as to the desirable extent and form of the change. We think the following proposals are those which most clearly merit consideration.

(a) Abolition of any time restriction on the presentation of divorce petitions.

(b) Retention of the present time restriction, but amendment of the conditions which at the moment have to be satisfied if leave is to be granted to file a petition within the restricted period. The new basis on which the court would, exceptionally, be given jurisdiction to grant a divorce within the period might be, either:
(i) The court would be given a discretion to grant a decree within the period. Guidelines might be laid down to govern the exercise of such a discretion; or

(ii) The court would be empowered to grant a decree within the period provided that the parties had gone through procedures designed conclusively to establish the absence of any prospects of reconciliation; or

(iii) The court would be empowered to grant a decree within the period if it were satisfied that the marriage had irretrievably broken down rather than, as under the present law, being obliged to presume irretrievable breakdown on proof of any of the "facts" set out in section 1(2) of the Matrimonial Causes Act 1973.[199]

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199 See para.24, above.

(c) Retention of a shorter time restriction than the present three years, with power for the court to permit earlier divorce on the basis of whichever alternative may be adopted from those set out in paragraph (b) above.

(d) A bar on the presentation of divorce petitions within a period of either one or two years from the date of the marriage, with no discretion to permit earlier divorce.

60. This list does not, of course, exhaust the possible options for reform. For example, we know that it is sometimes suggested that there should be a restriction on divorce in the early years of marriage in those cases where children are involved. Although we do not at present favour this proposal, for reasons given in paragraphs 84 to 86 below, we would welcome comments on it, and on the reasons which we give for rejecting it. We would also welcome other proposals; we are well aware that on a topic as difficult as this there may well be other suggestions which should be considered by us before we make our final report. For the present, however, we turn to examine in detail those proposals which we have set out in the previous paragraph.

(a) Abolition of any time restriction

61. This solution might be adopted if the arguments which we have set out in paragraphs 47 to 53 above against any time restriction on the presentation of divorce petitions were regarded as persuasive. It would involve abolition of the present rule, without the substitution of any other restriction on divorce in the early years of marriage. Adoption of this solution would, it is true, mean that a spouse could in theory at least petition for a divorce (assuming that either the behaviour or the adultery "fact" could be established) the day after the wedding; but the Scottish experience does not suggest

that large scale resort to divorce immediately after marriage is a necessary or probable consequence of the absence of a specific restriction,[200] and a recent English investigation into the circumstances of divorcing couples provides no support for the view that couples separate precipitately on the emergence of marital difficulties.[201]

62. There may, however, be one particular adverse consequence of the abolition of the restriction to which we feel we should draw attention. This is that the possibility of obtaining a divorce immediately after the wedding could increase the number of "marriages of convenience",[202] and perhaps facilitate the emergence of a class of "professional bridegrooms" prepared, for a consideration, to contract marriages with persons wishing to acquire United Kingdom citizenship.[203] We are not in a position to assess the magnitude of this risk but in any case it seems to us that measures to counteract it should (if appropriate) be taken in the context of nationality and immigration law. The risk of such abuses occurring should not, in our view, be allowed to govern the general policy of family law.

63. It seems to us, therefore, that the proposal that the existing time restriction be abolished is a possible option for reform, subject to one major reservation to which we now turn.

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200 See paras.42-44, above.

201 Barbara Thornes and Jean Collard, Who Divorces, (1979) particularly at p.122.

202 In this context the expression refers to marriages entered into in order to enable a party to remain in the United Kingdom and to obtain United Kingdom citizenship: see Puttick v. A.-G. [1979] 3 W.L.R. 542, 549 per Sir George Baker P. Such a marriage may not be void, but the court may nevertheless refuse to make a declaration that it is valid: Puttick v. A.-G. ibid.

203 As in Messina v. Smith [1971] P.322, 323.

Should the "special procedure" apply to petitions presented in the early years of marriage?

64. If the present restriction were simply abolished undefended petitions, even those presented within a very short time after the date of the marriage, would be dealt with under the "special procedure",[204] so that a decree would be granted without any court hearing. This is an aspect of the matter which causes us considerable misgivings, since we consider it most important that the law should encourage spouses to explore any possibility of reconciliation, particularly if breakdown threatens in the "difficult early years".[205] Allowing petitions to be dealt with under the special procedure would effectively prevent the court from considering whether the proceedings should be adjourned to enable attempts to be made to effect a reconciliation.[206] We are aware of the limitations of formalised reconciliation procedures;[207] nevertheless it may be thought wrong to allow possibly precipitate divorce without giving the court at least the opportunity of encouraging attempts at reconciliation. We would therefore particularly welcome views from those who consider that the time restriction should be abolished as to whether they would be prepared to see the "special procedure" applied to divorces within, say, the first two or three years of the marriage. For our part we have grave reservations about whether it would be

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204 See the explanation at paras. 26-30, above.

205 The Field of Choice Law Com. No. 6 (1966) Cmnd. 3123, para. 19.

206 Matrimonial Causes Act 1973, s.6(2).

207 See paras. 69-70 below, and generally Marriage Matters, a consultative document issued by the Working Party on Marriage Guidance set up by the Home Office in consultation with the D.H.S.S. (1979).

appropriate to apply the "special procedure" to such cases.[208]

(b) Retention of a time restriction, with amendment of the conditions to be satisfied if divorce is to be granted within the period of restriction

65. At this stage we are not concerned with the question whether the period during which the availability of divorce is specially restricted should be three years (as under the present law) or some different period.[209] We merely consider possible options to replace the conditions which now govern the court's powers exceptionally to permit divorce within the restricted period. These options (which we consider in turn) may again be summarised as follows: (i) conferring a discretion on the court to which perhaps some guidelines would be attached, to grant a divorce within the restricted period; (ii) imposing a compulsory reconciliation procedure; and (iii) requiring irretrievable breakdown to be affirmatively proved by judicial hearing[210] rather than presumed from proof of a "fact".

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208 If the time restriction were abolished on the basis that petitions presented in the early years of marriage would not be dealt with under the "special procedure", it might be desirable to provide by statute that no petition within a restricted period should be dealt with otherwise than after an oral hearing before a judge. It is true that the matter could be dealt with simply by changes in the Matrimonial Causes Rules but this would provide no safeguard against future amendment once again applying the "special procedure" to all undefended divorce cases, whatever the duration of the marriage.

209 This matter is discussed at paras.77-78, below.

210 As opposed to the "special procedure", as to which see paras.26-30, above.

(i) Giving the court a discretion to permit divorce within the restricted period

66. Under the simplest version of this proposed solution, the court would be empowered to permit divorce within the restricted period if it found that there were "special circumstances" justifying this course, or simply if the court found it just in all the circumstances to do so. This solution would have the advantage of avoiding the concentration on the respondent's conduct which is so often an objectionable feature of the present law. But the absence of any clear guideline would make it difficult for the courts to apply the law consistently; some courts would no doubt construe the power narrowly (particularly if it were phrased in terms of "special circumstances"), whilst others might permit divorce more readily. We do not think it would be satisfactory to leave it to the courts to set a pattern from which the legal profession would have to forecast the likely result on given facts,[211] since in this sensitive area so much would depend on individual judicial attitudes on a matter of social policy which Parliament should decide.

67. The view that conferring such a general discretion without guidelines would give rise to problems is, we think, reinforced by the Australian experience. Until 1975 Australia had a divorce law based on matrimonial offence grounds and a three year restriction similar to that in England and Wales. The Family Law Act 1975 makes irretrievable breakdown of marriage the sole ground for divorce[212] but provides that breakdown can be established only by proof of twelve months' separation before the commencement of the proceedings.[213] The Australian Act provides[214] that where

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211 Cf. Firman v. Ellis [1978] Q.B.885, 905 per Lord Denning M.R.

212 Family Law Act 1975 (Aus.) s.48(1).

213 Ibid., s.48(2). This provision in itself prevents a divorce within twelve months of the marriage.

214 Ibid., s.14.

the parties have been married for less than two years the court will not hear the proceedings in the absence of "special circumstances", unless the parties have considered a reconciliation with the assistance of an approved counselling agency. We deal elsewhere[215] with the working of the reconciliation procedure; at this stage we simply note that considerable difficulty has been experienced in applying the rule that the court may hear the petition if "special circumstances" are shown to exist.[216] Accordingly, we do not favour the proposal that the court should be given a general discretion to permit divorce within the restricted period.

68. There is, however, another possibility which may be thought to overcome some of these problems. This is that the court should be given a discretion as to whether a divorce within the period should be permitted, and such legislation would lay down guidelines indicating the considerations to which judges should have regard in the exercise of discretion. A simple version of such a reform would, for example, direct the judge to "have regard" to the hardship suffered by the petitioner, the interests of any children of the family, and the question whether there is any reasonable prospect of reconciliation between the parties.

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215 See paras.69-70, below.

216 See H.A. Finlay, Family Law in Australia 2nd ed. (1979) pp.152-154. In In The Marriage of Nuell (1976) 1 Fam. L.R. 11,239, Fogarty J. held that "special circumstances" in this context lay in the fact "that the marriage had completely broken down, that neither party was interested in its continuance and both desired a divorce, particularly where there are no children": ibid., at p.241. In Birch v. Birch [1976] F.L.C. 90-088, however, Barblett P. disagreed that these amounted to "special circumstances". Instead he found special circumstances from the fact that the specified time limit (2 years) had elapsed on the day of the hearing though not when proceedings had been instituted. This decision was not followed in Philippe v. Philippe [1978] F.L.C. 90-433 where, on similar facts to those in Birch, O'Connor J. found no special circumstances to exist.

This particular formulation would have the added advantage that it would largely follow the substance of the existing law, whilst removing any reference to the respondent's conduct. However, the major disadvantage of this and other similar proposals is that, as under the present law, they would not overcome the difficulty that different judges would decide similar cases in different ways.[217] It might be argued that the solution would constitute an abdication of responsibility by Parliament in favour of the judiciary; and that if there is to be a bar on divorce it should be made clear on what basis the courts are, exceptionally, to permit it. For these reasons, although we think that this proposal could be an improvement on the present restriction (since it would remove from the law the emphasis on the respondent's conduct) our present inclination is to reject it. We would, however, welcome views on the proposal, and, if it is thought acceptable, on the guidelines to which the courts' attention should be drawn.

(ii) A compulsory reconciliation procedure

69. The policy underlying the present three year restriction is based primarily on the desire to promote reconciliation in the early years of marriage,[218] and to encourage newly married couples to resolve their difficulties without resorting to divorce proceedings. It would seem attractive, therefore, to require that spouses who seek dissolution of a short marriage should first be required to receive guidance in an attempt to promote a stable and satisfactory reconciliation. In this connection it should

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217 Cf. the evidence collected by W. Barrington Baker, John Eekelaar, Colin Gibson and Susan Raikes, in The Matrimonial Jurisdiction of Registrars (1977) of diversity of practice in the exercise of the courts' discretion in relation to financial orders made under the Matrimonial Causes Act 1973, s.25(1).

218 See Bowman v. Bowman [1949] P.353, 357 per Denning L.J.

be noted that the importance of making readily available the services of those with the requisite personal qualities for, and specialised training in, work of this kind (particularly in the case of applications for leave to petition within three years of marriage) has already been officially recognised in this country by the creation of machinery within the court system.[219] This machinery involves reference by the court of suitable cases to the court welfare officer, who decides (after discussion with the parties) whether there is some reasonable prospect of reconciliation. If so, the matter is referred to an appropriate agency. This machinery is now available in all divorce cases, and may be invoked not only when the court thinks there is a reasonable possibility of reconciliation, but also where there are ancillary proceedings in which conciliation[220] might serve a useful purpose. We do not doubt that conciliation has a useful part to play in matrimonial disputes, but the evidence is that the scheme has had little effect in achieving reconciliation.[221] In particular, it should be noted that the scheme is voluntary, since experience showed that reconciliation was unlikely to be successful in the absence of readiness to co-operate on the part of the spouses.[222] This view is supported by the

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219 S. v. S. [1968] P.185; Practice Note (Divorce: Conciliation) [1971] 1 W.L.R. 223.

220 "Reconciliation" means "re-uniting persons who are estranged" (Report of the Committee on One-Parent Families (1974) Cmnd.5629, para.4.305), "conciliation" means the process of "engendering common sense, reasonableness and agreement in dealing with the consequences" of marital breakdown with the minimum possible anxiety and harm to the parties or their children (ibid., and see Practice Note (Divorce: Conciliation) [1971] 1 W.L.R. 223).

221 Report of the Committee on One-Parent Families, (1974) Cmnd.5629, para.4.294; Marriage Matters (1979) H.M.S.O. p.121 (referring generally to the statutory provisions designed to encourage reconciliation).

222 S. v. S. [1968] P.185.

Australian experience. We have already noted[223] that where the parties have been married for less than two years the Australian Family Law Act 1975 only allows the court to hear the suit (in the absence of "special circumstances") if the parties have considered reconciliation with the assistance of an approved agency. It would seem that this compulsory reconciliation procedure serves little purpose. It has been said that "in many cases - probably the vast majority - it is a complete façade, the parties attending counselling merely so they can say they have done it and get on with the divorce case".[224]

70. We should draw attention to the fact that in an important recent discussion paper[225] The Law Society's Family Law Sub-Committee has proposed[226] that the present three year rule should be replaced by a provision preventing divorce proceedings within two years of the marriage "unless the parties have discussed the possibility of reconciliation with a welfare officer of the court or an officer of an approved marriage counselling organisation; or there are special circumstances by reason of which filing of the petition should be permitted".[227] Nevertheless, the evidence against the utility of compulsory reconciliation procedures

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223 See para.67, above.

224 Per Barblett P. in Birch v. Birch [1976] F.L.C. 90-088. It has been said that compulsory counselling may help spouses to understand the cause of their breakdown and to avoid disastrous alliances in future, but does little to reconcile the spouses (who have necessarily already been separated for at least 12 months since that is the only ground on which a petition may be presented). See Second Annual Report of the Family Law Council (1978) (Australian Government Publishing Service) paras.20-24.

225 A Better Way Out (1979).

226 In the context of 12 months' separation being substituted for the present "facts" on the basis of which breakdown can be established: see ibid., para.52.

227 Ibid., para.57.

seems to us to be strong. We doubt if it would be an appropriate use of scarce resources to insist that they be used in cases where there is no realistic prospect of success. Accordingly we do not favour this proposal. However, as we have already said[228] we attach great importance to any possibility of reconciliation being skilfully and sensitively explored, which is why we expressed our doubts about the appropriateness of the application of the special procedure to proceedings for divorce early in the marriage.

(iii) Irretrievable breakdown to be proved, rather than presumed

71. Under this proposal, if a petition were presented within the restricted period the petitioner would not only have to satisfy the court of one or more of the specified "facts"; he would also have to satisfy the court, as a separate issue, that the marriage had broken down irretrievably. The objective of this proposal would be to provide some additional safeguard against the possibility that precipitate divorce might destroy a marriage which could in fact have been saved, whilst avoiding the artificiality of a compulsory counselling procedure and the problems associated with conferring on the court a broad discretion to permit divorce within the restricted period.[229]

72. To understand the proposal it has to be remembered that under the law as it now stands, although the ground for divorce is that the marriage has broken down irretrievably, it is not necessary for the court to be affirmatively satisfied that such breakdown has occurred. On proof of a "fact" such as behaviour or adultery the court must[230]

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228 At para.64, above.

229 See paras.66-70, above.

230 The language "is peremptory": Parsons v. Parsons [1975] 1 W.L.R. 1272, 1275 per Sir George Baker P.

grant a decree[231] unless it is satisfied that the marriage has not broken down irretrievably.[232] Thus, a rebuttable presumption (in practice a strong presumption)[233] of irretrievable breakdown arises from proof of a "fact", and the onus shifts to the respondent to prove, if the court is to dismiss the petition, that the marriage has not broken down. The court may therefore find itself obliged to grant a decree even if it has lingering doubts about whether the marriage has in truth broken down irretrievably.[234] In practice, of course, in the vast majority of cases there could be no doubt about the matter, for as Lord Simon of Glaisdale put it: [235]

> "If even one of the parties adamantly refuses to consider living with the other again, the court is in no position to gainsay him or her. The court cannot say, 'I have seen your wife in the witness-box. She wants your marriage to continue. She seems a most charming and blameless person. I cannot believe that the marriage has really broken down.' The husband has only to reply, 'I'm very sorry; it's not what you think about her that matters, it's what I think. I am not prepared to live with her any more.' He may add, for good measure, 'What is more, there is another person with whom I prefer to live.' The court may think that the husband is behaving wrongly and unreasonably; but how is it to hold that the marriage has nevertheless not irretrievably broken down?"

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231 Unless any bar is established: see n.92, above.

232 Matrimonial Causes Act 1973, s.1 (4); see para.24, above.

233 Santos v. Santos [1972] Fam. 247, 255 per Sachs L.J.

234 If the court were in doubt it would no doubt exercise its power under the Matrimonial Causes Act 1973, s.6(2) to adjourn the proceedings to enable attempts to be made to effect a reconciliation. But those attempts might be inconclusive, and the court would then, even if still in doubt, be bound to grant a decree.

235 In the Riddell Lecture, which is reproduced in Rayden on Divorce (11th ed., 1971) p.3233.

73. It follows that a change in the law on these lines would in most cases have little effect; the evidence of irretrievable breakdown - even if it were only the petitioner's assertion - would be clear and compelling, and the court would grant a decree without the need for detailed probing and questioning. But if the court were left in doubt as to whether or not there were any realistic possibility of saving the marriage it could either refuse to grant a decree or adjourn the proceedings to enable attempts to be made to effect a reconciliation.[236] It would not be unreasonable that in cases of such doubt a couple should be required to wait until the end of the restricted period. We do, of course, appreciate that this proposal might be regarded as somewhat technical and limited. Nevertheless we think that it deserves serious consideration, since it would at least ensure that the possibility of reconciliation in the early years could be explored if the evidence gave any hint that the marriage could still be saved.

74. If this proposal were adopted[237] there would, we think, be three procedural questions which would need to be resolved. The first is whether there would have to be an oral hearing of every petition brought within the restricted period, or whether the "special procedure" would be allowed to apply in undefended cases. As we have said we do not envisage that in the majority of those cases the court would need to carry out a detailed enquiry into the background to the petition, since in the majority of cases the evidence of irretrievable breakdown would be cogent and compelling. Nevertheless, our present view is that it would be inappropriate to permit such cases to be decided under the

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236 Matrimonial Causes Act 1973, s.6(2).

237 The risk of a larger number of "marriages of convenience", to which we referred in para.62 above, must also be borne in mind in relation to this option.

special procedure, since the presence of at least one of the parties seems to us to be essential if the court is to be in a position to detect those (albeit perhaps very few) cases in which the possibility of reconciliation would be at least usefully explored.

75. The second question is whether, if this option were adopted, it would be necessary to preserve the existing two-stage procedure of an application for leave followed by a hearing of the petition. We do not think that such a procedure would serve any useful purpose. A judge who was not satisfied that irretrievable breakdown had been proved would simply dismiss or adjourn the suit - perhaps until the expiry of the restricted period.

76. Thirdly, there is the question of legal aid. We consider it unlikely that the proposal would be acceptable unless legal aid were available for such cases. No change in the law would however be required; petitions would be heard in open court and would thus come within the existing exceptions to the 1977 withdrawal of legal aid for undefended divorces.[238] It is, we think, doubtful whether the adoption of this procedure would involve any very significant increase in legal aid expenditure, because applicants who apply for leave to present a petition under the present law are already eligible for legal aid.[239]

(c) Shortening the period of restriction

77. In considering the various options for reform of the conditions governing the court's power exceptionally to permit divorce within the restricted period we have so far left open the question of whether the period of restriction should be changed.

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238 S.I. 1977 No. 447, r.2. See para.30, above.

239 Ibid., r.3.

78. Selection of any period is bound to be somewhat arbitrary. However, we consider that there is a case for reducing the period during which a petition could not be presented from three to two years, partly on the basis of consistency with the rest of the divorce legislation. As we have said,[240] perhaps the strongest objection to the present rule is that it may operate to keep in existence, contrary to the parties' wishes, the legal shell of a marriage which has irretrievably broken down. We referred in paragraph 47 to the view that a period of separation is the most convincing evidence of breakdown, and the passing of time the most reliable indication that it is irretrievable.[241] English law has selected two years as sufficient prima facie indication of irretrievable breakdown,[242] and it seems somewhat inconsistent with that choice to require (in the absence of "exceptional" factors) a longer period where the separation starts shortly after the marriage. We nevertheless accept that this argument is not wholly compelling since the policy factors which should govern the selection of the period of separation sufficient to raise an inference of breakdown are not exactly the same as those which should govern the selection of a minimum period from the date of the marriage within which divorce should be regarded as exceptional, the more so since petitions may well be based on a "fact" other than separation. We would therefore particularly welcome views on whether, assuming that any restriction is to be

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240 See para.23, above.

241 Pheasant v. Pheasant [1972] Fam. 202, 207, per Ormrod L.J.; see also para.4 of the note summarising the agreement reached between the Law Commission and the Archbishop's Group on Divorce in 1966 (reprinted in the Law Commission's Third Annual Report (1968) Law Com. No. 15 Appendix III). It is this view which has led to the adoption of a period of separation as the sole ground for divorce in, e.g., Australia (see para.67, above); and the suggestions that the same rule should be applied in this country: see, e.g. A Better Way Out, (1979) paras.44-52.

242 I.e. in relation to facts based on desertion, or living apart (provided in the latter case that the parties are agreed on divorce). See Matrimonial Causes Act 1973, s.1(2)(c), (d).

preserved, the period during which divorce should only exceptionally be permitted should be changed from three years and, if so, what the period should be.

(d) An absolute bar on the presentation of divorce petitions within a stipulated period from the date of the marriage

79. Under this proposal, no petition for divorce could be presented in any circumstances before the expiration of one or two years from the date of the marriage. There would thus be two changes in the present law. First, the specified period would be reduced from three years; secondly, the court would no longer have power to grant leave to present a petition within the restricted period on the ground that the case is one of exceptional hardship or exceptional depravity.

80. The argument in favour of this proposal can be put in this way. The justification for a time restriction is one of public policy; it would devalue the institution of marriage to make divorce readily obtainable within days of the marriage. The present law is on this view based on a sound principle, but is objectionable because of the unsatisfactory nature of the exceptions whereby the court may allow a petition to be presented on proof of exceptional hardship or depravity. Although it would be possible to construct other exceptions, none of them is entirely satisfactory. The law would on this view be simpler and more comprehensible if it asserted the general policy by means of an absolute bar on divorce early in marriage.

81. It would no doubt be said that this proposal would deny divorce in cases where the need for matrimonial relief may be greatest. It was, after all, the argument that the cases where divorce was desired in the first one or two years

of marriage, especially the first year of marriage, were "the very worst cases very often that ever come before the courts"[243] that led Parliament in 1937 to reject, in favour of the present restriction, the proposal that no divorce should be allowed in the first five years of marriage.[244] Nevertheless, those who now support the proposal which we have set out would, we think, say that this argument is no longer valid, for denial of divorce in the first years of marriage no longer amounts to denial of effective matrimonial relief in that period. As we have already pointed out,[245] virtually all forms of legal remedy, by way of arrangements for children, financial provision and protection are now available by other means right from the inception of the marriage. The only thing which is not, and on this view should not be,made available in the early years of marriage is the right to re-marry.

82. This proposal has the great advantage of simplicity, and we are persuaded that it deserves serious consideration. However, in our view it could only be acceptable on the basis that the period during which divorce is not available would be shorter, and perhaps significantly shorter, than under the present rule. Denial of the freedom to re-marry for a period of three years can, as we have suggested[246] sometimes cause grave hardship, and in our view the imposition of such hardship in particular cases would outweigh any advantages to be gained from a straightforward

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243 Hansard (H.L.) (1936-7) Vol. 105, col. 755, per Lord Atkin.

244 See para.6, above.

245 Para.57, above.

246 See para.50, above.

absolute bar of the type proposed. In our opinion, denial of the right to petition[247] for a period of longer than one or two years from the date of the marriage would be unacceptable. We would welcome views on this proposal, and if it were thought acceptable, on the length of the period during which divorce would not be available.

(9) Our provisional view

83. Our provisional view is that the present rule is unsatisfactory. We believe that some restriction on divorce in the early years of marriage is desirable but that the present rules governing the circumstances in which leave to petition can be granted are incompatible with the modern philosophy of divorce. We also consider that the three years restriction may be too long. We have not, however, formed a unanimous view about what should be substituted for the present rule. Some of us favour the option set out in paragraphs 71 - 76 above, that is, first that the "special procedure" should not apply to petitions presented within the restricted period; and secondly that the court should require to be satisfied in such cases not only of the "fact" evidencing breakdown but also that the marriage has irretrievably broken down. Others of us at present prefer the option set out in paragraphs 79 - 82 above, that is that there should be an absolute bar on the presentation of any petition for divorce until the expiry of one or two years from the date of the marriage, and that the normal rules should apply thereafter.

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247 The prohibition would be on the presentation of a petition; the period which would elapse between the marriage and decree absolute would thus in practice be perhaps six months longer than the period specified.

84. As we have said[248] we cannot be confident that we have in this paper identified all those options for reform which deserve consideration. For example we are aware that there is a body of opinion which would be prepared to see the abolition of the present time restriction in the case of childless marriages, provided that a restriction were retained in other cases. It may be helpful if we briefly summarise the reasons why we do not, at the moment, favour drawing a distinction of this kind.

85. The case for making the availability of divorce within the early years of marriage depend on whether or not the marriage is childless rests, we think, on the view that it is in the interests of children (and particularly very young children) that their parents' marriage should be preserved. In the Commission's Report on the grounds of divorce, The Field of Choice,[249] doubt was expressed as to whether it was practicable or desirable to attempt to differentiate radically between marriages with children and those without, since such a differentiation would inevitably mean that the children would come to be regarded as the main obstacle to the parents' happiness, - a factor especially important in those cases where both parents wanted a divorce. In this respect the report followed the view of the Archbishop's Group: "We cannot think it just ... that there should be one law of divorce for those with children and another for those without".[250] We have no doubt that this was the right decision; but irrespective of whether or not this point of view is accepted in relation to the availability of divorce in general we are quite firmly of the view that it would be wrong to impose an absolute bar on the availability of divorce in the early years of marriage merely because children are involved. Such a bar would

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248 At para.60, above.

249 Law Com. No. 6 (1966) Cmnd.3123, paras. 47-51.

250 Putting Asunder, para.57.

inevitably mean that some children would be further, and unnecessarily, exposed to the emotional stress and disturbance of living in a household where the spouses' relationship had completely broken down to the extent that both agreed that divorce was inevitable. No doubt in many such cases the spouses would separate and thus minimise the risk of psychological harm to the children; but there would inevitably be cases where withholding divorce would make it difficult for the spouses to separate. Another consequence of such a bar would be to prevent, for a time, the re-marriage of the spouses even in those cases where re-marriage could be expected to give the children the security of which they had been deprived by the breakdown of their parents' marriage.

86. We accept that the case against the proposal that the availability of divorce within the early years of marriage should depend upon whether or not children are involved is not so strong if it is envisaged that, as at present, the court would have a discretion to permit divorce within the restricted period - and, indeed, under the existing law[251] the court is required to consider the interests of any child of the family as one factor in deciding whether or not to grant leave to present a petition within the restricted period. Nevertheless, we do not favour applying any special rule to cases where there are children. Under the proposal tentatively advanced in paragraphs 71-76 of this paper a court would not be empowered to grant a decree nisi unless affirmatively satisfied that the marriage had irretrievably broken down. If the court were so satisfied we do not think that it can be in the interests of children, given that divorce will in any case be available at the end of the restricted period, to deny their parents the right to be free from the marriage. It should in any event be remembered that even if a decree nisi is granted, the court

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251 Matrimonial Causes Act 1973, s.3(2).

must still satisfy itself about the arrangements proposed for the children before the decree can be made absolute.[252] We do not therefore accept any general principle that there should be a distinction as to the availability of divorce in the early years of marriage depending on whether or not the marriage is childless. If, however, such a distinction were to be adopted, it would be necessary to give careful thought to ensure that the legislation identified those cases in which the existence of a child would operate as a bar to divorce - particularly if the bar in question were to be absolute. It could not, we think, be appropriate that the bar should operate in all cases where there was in existence "a child of the family" within the definition contained in section 52 of the Matrimonial Causes Act 1973,[253] since that definition would include, for example, a child of whatever age by either spouse's previous marriage.

87. Although our present inclination is to reject this proposal, we would welcome comments on it; and we would also welcome any other proposals for reform which it is thought deserve consideration in our final report.

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252 Matrimonial Causes Act 1973, s.41.

253 "Child of the family", in relation to the parties to a marriage, means -

(a) a child of both of those parties; and
(b) any other child, not being a child who has been boarded-out with those parties by a local authority or voluntary organisation, who has been treated by both of those parties as a child of their family.

(10) Summary: questionnaire

88. It may now be helpful if we attempt to summarise in the form of a questionnaire the main issues on which we feel comment would be helpful:

A. Should any change be made in the existing rule under which no petition for divorce can be presented to the court before the expiration of the period of three years from the date of the marriage, unless the court gives leave to do so on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent?

B. If so, what form should the change take?

The possibilities canvassed in this paper are:

(a) Outright abolition of the time restriction on the presentation of divorce petitions; (paragraphs 61-64)

(b) Retention of a time restriction, but allowing the court power to permit divorce within the restricted period in certain cases. (paragraphs 65-78)

If this solution is preferred it is necessary to decide: (i) what should the length of the restricted period be? and (ii) in what circumstances should the court have the power to permit earlier divorce?

(i) What should be the length of the restricted period? We have suggested that a period of two years

from the date of the marriage to the date of the presentation of a petition might be appropriate. Would this be acceptable?

If not, what other period would be preferable?

(ii) What are the circumstances in which the court should have power to permit divorce within the restricted period? One of the options put forward is that the court should be empowered to grant a decree if, after a hearing before the judge at which the petitioner is available for examination, the court is satisfied not only that one or more of the "facts" on the basis of which a divorce can be granted has been established, but also that the marriage has broken down irretrievably. Is this acceptable?

Or is one of the other proposals considered in the working paper preferable? Those other proposals are:

(i) The court would be given a discretion to grant a decree within the period. Guidelines might be laid down to govern the exercise of the discretion; but if so what should they be?

or (ii) The court would be empowered to grant a decree within the period provided that the parties had gone through procedures designed conclusively to establish the absence of any prospects of reconciliation.

(c) The final option considered in the working paper is the imposition of a bar on the presentation of divorce petitions within a period of either one or two years from the date of the marriage, with no discretion to permit earlier divorce. (paragraphs 79-82) If this option is preferred, should the period be one year, two years, or some other period?

C. Is it agreed that the availability of divorce in the early years of marriage should not depend on whether or not the marriage is childless? (paragraphs 84-87)

D. The final question is whether any proposal other than those discussed should be put forward?

PART III - REFORM OF THE NULLITY RULE

(1) Introduction: the statutory provision

89. We now turn to examine the operation of the time limit on petitions for nullity in cases where one or both of the parties suffers from mental incapacity. Section 13(2) of the Matrimonial Causes Act 1973 provides that the court shall not grant a decree annulling a voidable marriage on any ground apart from those based on failure to consummate[254] unless proceedings are instituted within three years of the marriage.

90. Two of the grounds on which a marriage is voidable are particularly relevant to mental capacity. These two grounds are:

(i) that either party to the marriage did not validly consent to it whether in consequence of duress, mistake, unsoundness of mind or otherwise;[255]

(ii) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1959 of such a kind or to such an extent as to be unfitted for marriage.[256]

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254 I.e. the incapacity of either party to consummate the marriage, or the wilful refusal of the respondent to do so: Matrimonial Causes Act 1973, s.12(a) and (b). In such cases the only bar on proceedings arises if there has been "approbation" of the marriage; see s.13 (1) of the 1973 Act, set out in Appendix 2, below, and D. v. D. (Nullity: Statutory Bar) [1979] Fam.70. "Approbation" is relevant to any nullity proceedings based on a voidable marriage.

255 Matrimonial Causes Act 1973, s.12(c).

256 Ibid., s.12(d).

(2) The problem and its history

91. Until 1971, when the Nullity of Marriage Act 1971 was passed, ground (i) above, that is, lack of consent to marriage (whether that lack of consent arose because of mental incapacity or otherwise) rendered a marriage void rather than voidable;[257] petitions on that ground were not subject to any time limit and could indeed be brought even after the death of one or both of the parties.[258] It was, however, in practice extremely difficult to establish that mental illness or deficiency was so severe as to affect the validity of consent to what has been held to be a very simple contract.[259] Accordingly, the Matrimonial Causes Act 1937[260] provided that a marriage should be voidable in certain cases on the ground of the mental illness of either party. It was not necessary to show that the illness affected consent to marriage, but petitions could only be brought within a limited time from the date of the marriage.[261]

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257 Dicta are to be found suggesting that lack of consent made a marriage voidable rather than void but this view is convincingly refuted by D. Tolstoy, "Void and Voidable Marriages" (1964) 27 M.L.R. 385.

258 Re Park [1954] P.112; cf. In re Roberts dec'd., Roberts v. Roberts [1978] 1 W.L.R. 653.

259 Re Park [1954] P.112, 136 per Hodson L.J.

260 Sect.7(1). The provision was reformulated in s.8(1) of the Matrimonial Causes Act 1950, which in turn was replaced by the provision set out in para.90, above: Nullity of Marriage Act 1971, s.2(d), now re-enacted as s.12(d) of the Matrimonial Causes Act 1973. The present provision gives effect to the recommendation made in the Law Commission's Report on Nullity of Marriage, Law Com. No. 33 (1970) paras. 69-74.

261 Originally one year: Matrimonial Causes Act 1937, s.7(1). The 1971 Act substituted the period of three years: s.3(2); see now Matrimonial Causes Act 1973, s.13(2).

92. In 1970 the Law Commission issued a Report on Nullity of Marriage[262] which, among other matters, dealt with the question of mental incapacity as it affected consent to marriage, and the question of a time bar. The Commission recommended that lack of consent to marriage (whether caused by mental incapacity or not) should make a marriage voidable instead of void.[263] This recommendation was implemented in the Nullity of Marriage Act 1971.

93. The same Act implemented the recommendation that a time limit should be applied to petitions based on lack of consent. We said:-[264]

> "In our view, a view shared by a substantial majority of those we consulted, it should not be possible to avoid a marriage on this ground unless proceedings are brought within three years. The case for this is strongest when the absence of consent is due to mistake or duress. A party to such a marriage should decide as soon as possible whether to avoid it or to accept it as a valid marriage, and three years is more than sufficient in which to make such a decision. Where the absence of consent is due to unsoundness of mind it could be argued that it would be unfair to impose the time-limit since there might not be a recovery within the three years. We think, however, that even then there would be no serious risk of hardship since proceedings could be taken on the patient's behalf within three years. Moreover, if a time-limit is imposed, as it already is, on proceedings to annul a marriage on the ground of mental disorder of a type unfitting for marriage, we think that there are obvious advantages in applying the same rule to unsoundness of mind which happens to deprive the party of his ability to consent. Many of the

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262 Law Com. No. 33(1970).

263 Ibid., para.15; and see In re Roberts dec'd., Roberts v. Roberts [1978] 1 W.L.R. 653, 655 per Walton J.

264 Ibid., para.85. This recommendation was contrary to that of the Royal Commission on Marriage and Divorce (the Morton Commission: (1956) Cmd. 9678) who recommended a power to extend the time limit (then 12 months) in every case of voidable marriage where a time limit applied, not only where there was mental incapacity.

> practical advantages of the rationalisation that we are striving to achieve would be destroyed if the time-limit, while applied to other forms of absence of consent and to other forms of insanity, did not apply to this."

Experience of the working of the rule has shown that some of these arguments were invalid; and that the time limit may operate harshly in cases where a party to a marriage is suffering from mental illness. In particular, it has proved to be unsatisfactory to rely on proceedings being taken on a patient's behalf under the Mental Health Act 1959.[265] It has been pointed out to us by the Official Solicitor that a relative or a welfare authority would have to intervene and a next friend would have to be appointed by the court before proceedings could be begun on behalf of a patient, and that the three year period might well have elapsed before an interested third party came to know all the facts and took the necessary action. The result of a failure to start proceedings within three years is particularly harsh in cases where advantage has been taken of a, perhaps severely, incapacitated person by someone who hopes to gain financially by the marriage. If proceedings to annul the marriage are not started within the stipulated period it will be too late to put its validity in issue, and if one spouse then dies the surviving partner will be entitled[266] to succeed on the other's intestacy.[267]

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265 Sect. 103(1)(h).

266 Certain relatives of the deceased, and other dependants, may be entitled to apply to the court for reasonable financial provision out of the deceased's estate under the Inheritance (Provision for Family and Dependants) Act 1975, but the class of eligible applicant is restricted: see 1975 Act, s.1.

267 The marriage will operate to revoke any existing will: Wills Act 1837, s.18; In re Roberts dec'd., Roberts v. Roberts [1978] 1 W.L.R. 653.

94. In the light of this experience, we consider that it would be right to give the court a discretion to extend the time limit in nullity cases based on either of the two mental incapacity grounds.

95. In our Report on Nullity of Marriage[268] we expressed fears[269] that conferring such a discretion to enlarge the time for instituting proceedings would of necessity mean that the "status of the marriage" would remain uncertain so long as it was open for leave to be granted to present a petition. We now consider this fear unfounded. There will be no uncertainty of status because a voidable marriage now subsists unless, and until,[270] a decree of nullity is made;[271] the marriage is valid unless and until action is taken to annul it. It is true that such action might be taken at any time, but this no more affects the status of the marriage than does the possibility that divorce proceedings might be instituted at any time.

96. Cases of hardship may also arise where a spouse, who could establish one of those grounds for annulment which are subject to the time limit,[272] fails to present a petition within the stipulated time because he has become mentally disordered after the marriage. In such a case the time limit could operate as harshly as it would if the nullity petition had itself been based on the incapacity, and we would therefore recommend that the court's power to

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268 Law Com. No. 33 (1970).

269 Ibid., para.79.

270 Because under the Matrimonial Causes Act 1973, s.16 a nullity decree in a case of a voidable marriage annuls the marriage prospectively and the marriage is treated as if it had existed up to the date of the decree.

271 Matrimonial Causes Act 1973, s.16; and see In re Roberts, dec'd., Roberts v. Roberts [1978] 1 W.L.R. 653.

272 I.e. duress; or mistake which negatives consent; or the respondent's venereal disease; or the respondent's pregnancy by someone other than the petitioner: s.12 of the Matrimonial Causes Act 1973, set out in Appendix 2, below.

enlarge the time within which petitions may be presented should apply not only to cases where the applicant was suffering from mental incapacity at the date of the marriage but also to cases where he became subject to such incapacity within three years from such date.

97. We do not propose specific guidelines such as the court has when considering whether to extend the time limit under the Limitation Acts 1939 to 1975.[273] We think that the court's discretion should be unfettered and that leave to file a petition should be granted in a case of mental incapacity where it is equitable to do so.

(3) Provisional recommendation

98. Accordingly our provisional recommendation, in relation to the time limit in nullity proceedings imposed by section 12 of the Matrimonial Causes Act 1973, is that the court should have a discretion to extend the time limit where the petitioner was suffering from mental incapacity at the time of the marriage, or became subject to such incapacity within three years of the marriage. We would welcome comments on this proposal.

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273 Sect. 2D(3) of the Limitation Act 1939, added by the Limitation Act 1975, s.1.

APPENDIX 1

SECTION 3 OF THE MATRIMONIAL CAUSES ACT 1973

3.-(1) Subject to subsection (2) below, no petition for divorce shall be presented to the court before the expiration of the period of three years from the date of the marriage (hereafter in this section referred to as "the specified period").

(2) A judge of the court may, on an application made to him, allow the presentation of a petition for divorce within the specified period on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent; but in determining the application the judge shall have regard to the interests of any child of the family and to the question whether there is reasonable probability of a reconciliation between the parties during the specified period.

(3) If it appears to the court, at the hearing of a petition for divorce presented in pursuance of leave granted under subsection (2) above, that the leave was obtained by the petitioner by any misrepresentation or concealment of the nature of the case, the court may -

(a) dismiss the petition, without prejudice to any petition which may be brought after the expiration of the specified period upon the same facts, or substantially the same facts, as those proved in support of the dismissed petition; or

(b) if it grants a decree, direct that no application to make the decree absolute shall be made during the specified period.

(4) Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which occurred before the expiration of the specified period.

APPENDIX 2

SECTIONS 12 AND 13 OF THE MATRIMONIAL CAUSES ACT 1973

12. A marriage celebrated after 31st July 1971 shall be voidable on the following grounds only, that is to say -

(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;

(b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;

(c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;

(d) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1959 of such a kind or to such an extent as to be unfitted for marriage;

(e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;

(f) that at the time of the marriage the respondent was pregnant by some person other than the petitioner.

13.-(1) The court shall not, in proceedings instituted after 31st July 1971, grant a decree of nullity on the ground that a marriage is voidable if the respondent satisfies the court -

(a) that the petitioner, with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so; and

(b) that it would be unjust to the respondent to grant the decree.

(2) Without prejudice to subsection (1) above, the court shall not grant a decree of nullity by virtue of section 12 above on the grounds mentioned in paragraph (c), (d), (e) or (f) of that section unless it is satisfied that proceedings were instituted within three years from the date of the marriage.

(3) Without prejudice to subsections (1) and (2) above, the court shall not grant a decree of nullity by virtue of section 12 above on the grounds mentioned in paragraph (e) or (f) of that section unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged.

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